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{SHOW } PROCEEDINGS AND ORDERS DATE: 111984

CASE NBR 84-1-05247 CFH
SHORT TITLE Raulerson, James D. DOCKETED: Aug 15 1984
VERSUS Wainwright, Sec., FL DOC

Date	Proceedings and Orders
Aug 15 1984	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Sep 24 1984	Brief of respondent Wainwright, Sec., FL DOC in opposition filed.
Sep 27 1984	DISTRIBUTED. October 12, 1984
Oct 9 1984	Reply brief of petitioner James D. Raulerson filed.
Oct 18 1984	REDISTRIBUTED. October 26, 1984
Oct 29 1984	The petition for a writ of certiorari is denied. Justice Brennan, dissenting: Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v. Georgia, 428 U.S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case. Dissenting opinion by Justice Marshall. (Detached opinion.)

CONTINUE {

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PETITION FOR WRIT OF CERTIORARI

84-5247

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

JAMES DAVID RAULERSON,

Petitioner,

vs.

ORIGINAL

LOUIS L. WAINWRIGHT, Secretary Florida Department of Offender Rehabilitation, RICHARD DUGGER, Superintendent of Florida State Prison, and JIM SMITH, Attorney General, State of Florida

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether Mr. Raulerson was denied his right to proceed pro se, guaranteed by the Sixth Amendment, at his capital sentencing hearing when the trial court failed to conduct any inquiry following his motion to represent himself, in which he cited Faretta v. California, 422 U.S. 806 (1975), and instead informed him that all the law allowed was that he be allowed to act as co-counsel with his court-appointed lawyer?

2. Whether Mr. Raulerson can be held to have waived his Sixth Amendment right by his reliance on the court's erroneous statement of the law and his consequent failure to reassert his right to appear pro se?

3. Whether the decision of the United States Court of Appeals for the Eleventh Circuit that determinations of what constitutes a mitigating circumstances may vary from case to case because "[w]hat one [sentencer] considers as mitigating, another may not," conflicts with this Court's decision in Eddings v. Oklahoma, 455 U.S. 104 (1982), and the requirement of the Eighth and Fourteenth Amendments that capital punishment statutes be evenly applied in order to avoid the arbitrary and capricious imposition of the death penalty?

4. Whether the abject ineffectiveness of Mr. Raulerson's counsel at his only sentencing hearing before a jury is beyond review under the standards of the Sixth Amendment, despite the critical role the jury's recommendation of punishment plays in the ultimate sentencing decision by the trial judge and the Florida Supreme Court's review of sentences of death, because Mr. Raulerson received a resentencing without a jury to correct a violation of Gardner v. Florida, 430 U.S. 349 (1977)?

5. Whether this case should be remanded to the Court of Appeals for the Eleventh Circuit for reconsideration under the standards announced in this Court's decision in Strickland v. Washington, ___ U.S. ___, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984)?

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TABLE OF AUTHORITIES

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

JAMES DAVID RAULERSON,

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vs.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, James David Raulerson, requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in Raulerson v. Wainwright, 732 F.2d 803 (May 1, 1984). James David Raulerson is currently under sentence of death in the State of Florida.

OPINION BELOW

The opinion of the Court of Appeals for the Eleventh Circuit rendered on May 1, 1984, is reported at 732 F.2d 803. A copy of the opinion is appended to this petition as Appendix A. A Petition for Rehearing And, In the Alternative, Suggestion for Rehearing En Banc was denied by the Court of Appeals on June 11, 1984. A copy of the Court's order appears as Appendix B.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1). The opinion of the United States Court of Appeals for the Eleventh Circuit was rendered on May 1, 1984. A timely Petition for Rehearing And, In the Alternative, Suggestion for Rehearing En Banc was denied by the Court of Appeals on June 11, 1984.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the Florida Death Penalty Statute, Fla. Stat. 921.141, which appears as Appendix C to this petition.

HOW THE ISSUES WERE RAISED BELOW

Each of the constitutional issues in the Questions Presented were raised by petition for a writ of habeas corpus in the district court and raised on appeal to the United States Court of Appeals for the Eleventh Circuit. Each of the issues had been previously presented to the state courts of Florida, which had rejected the constitutional grounds asserted by the petitioner.

STATEMENT OF THE CASE

A. Prior Proceedings

Petitioner James David Raulerson was convicted by a jury on August 6, 1975, of murder in the first degree in violation of Fla. Stats. Sec. 782.04 (1973). The jury recommended the death penalty by a vote of eight to four on August 7, and a judgment of conviction and sentence of death were imposed on August 20, 1975. The conviction and death sentence were affirmed on appeal. Raulerson v. State, 358 So.2d 826 (Fla. 1978), cert. denied, 439 U.S. 959 (1978).

Following this Court's denial of certiorari, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Florida on March 23, 1979. While the petition was pending before the district court, the Governor of Florida signed a death warrant on April 18, 1980, authorizing petitioner's execution on May 21, 1980. On May 9, 1980, the District Court held that petitioner had been sentenced to death in violation of Gardner v. Florida, 430 U.S. 349 (1977), because he did not have an opportunity to rebut or to deny matter in the presentence report considered by the

sentencing judge. Raulerson v. Wainwright, 508 F. Supp. 381, 383-85 (M.D. Fla. 1980).

While the federal habeas corpus was pending, Mr. Raulerson filed a motion for post conviction relief in the state circuit court, which was denied by that Court on May 14, 1980. PCR R. I at 239-241.[1] A second sentencing hearing without a jury was held on August 11, 1980. The state circuit court again sentenced petitioner to death on August 12, 1980. R. App. II 81-90. The Florida Supreme Court consolidated appeals from the denial of post-conviction relief and the reimposition of the death sentence and affirmed both on August 26, 1982. Raulerson v. State, 420 So.2d 567 (Fla. 1982), cert. denied, ___ U.S. ___, 77 L.Ed.2d 1421 (1983).

A second application for post-conviction relief, raising two constitutional issues which had not been previously presented, was denied by the state circuit court on August 30, 1983, and affirmed by the Florida Supreme Court on September 1, 1983. Raulerson v. State, 437 So.2d 1105 (Fla. 1983).

A Petition for a Writ of Habeas Corpus was filed on behalf of Mr. Raulerson on September 2, 1983, in the United States District Court for the Middle District of Florida. An evidentiary hearing was held on September 6, and the district court entered an order denying the petition and an application for a stay of execution. The district court's order appears as Appendix D to this Petition.

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1. The following abbreviations will be used with reference to the transcript and appellate records in the previous court proceedings: "T. Tr." refers to the transcript of petitioner's trial in the circuit court on August 4-7, 1975. All other references to transcripts of state court proceedings are indicted by "Tr." and the date of the hearing. "R. App. I" refers to the Record on Appeal from the conviction and sentence in 1975. "R. App. II" refers to the Record on Appeal from the second imposition of the death sentence in 1980. "PCR R. I" refers to the Record on Appeal from the denial of post conviction relief on May 14, 1980. "PCR R. II" refers to the Record on Appeal from the denial of post conviction relief on August 30, 1983. "D. Ct. Tr." refers to the transcript of the habeas corpus hearing before the United States District Court for the Middle District of Florida held on September 6, 1983.

The United States Court of Appeals for the Eleventh Circuit entered a stay of execution on September 8, 1983. The Court of Appeals affirmed the denial of habeas corpus relief on May 1, 1984, in an opinion by Circuit Judge Henderson. Raulerson v. Wainwright,, 732 F.2d 803 (11th Cir. 1984) Senior Circuit Judge Tuttle concurred in part, dissented in part, and filed an opinion. 732 F.2d at 813.

B. Statement of Facts

James David Raulerson was convicted of murder in the first decree and sentenced to death for a homicide that occurred on April 27, 1975, at the Sailmaker Restaurant at Jacksonville, Florida. Two police officers, James English and Michael David Stewart, interrupted a hold-up in progress at approximately 11:15 p.m. on that date. T. Tr. 127. Both officers were shot in an exchange of gunfire. T. Tr. 129-131, 136-138. A total of 14 shots were fired. T. Tr. 129-155. Officer Stewart suffered a gunshot wound to the chest from which he died. T. Tr. 204. One of the perpetrators, Jerry Leon Tant, was also shot and killed at the scene. T. Tr. 129, 191-199. Mr. Raulerson suffered a gunshot wound to the stomach and was arrested at the scene. T. Tr. 153, 170-71, 179.

A jury was selected on August 4, and trial commenced on August 5. Mr. Raulerson was identified as a perpetrator and as the person who forced a young woman working at the restaurant to go into a back room and engage in sexual relations with him. T. Tr. 105-107, 144. Despite extensive pretrial publicity, counsel for Mr. Raulerson did no legal research regarding venue and did not file a motion for a change of venue. Counsel did not question jurors extensively in voir dire, did only minimal cross-examination, and presented no evidence at the guilt-innocence phase of behalf of Mr. Raulerson.

After the jury returned a verdict of guilty, a sentencing hearing was held before the same jury. Without defense objection, the State presented two witnesses who testified that petitioner had participated in a robbery of a grocery store in

Alabama. T. Tr. 424-441. Counsel for petitioner offered the testimony of four witnesses, two psychiatrists who testified that petitioner suffered a "defective conscience" or "passive aggressive personality," T. Tr. 475, 493, a doctor who testified about injuries he observed when Mr. Raulerson was in the hospital, T. Tr. 490-495, and Mr. Raulerson, who testified briefly about his family history and employment. T. Tr. 499-515.

Defense counsel did not argue any of the evidence presented to the jury. Instead, in a closing argument that covers less than three pages of transcript, he told the jury that its sentence was advisory and might not be followed by the court, that "I feel as though I fell down on my job yesterday and i do not feel as though I can persuade you now", and that it was very hard for him to get his "train of thought back." T. Tr. 545-547. Finally, he confessed, "I feel as though my effectiveness is at a very low end. It is very hard." The prosecutor argued the testimony presented by Mr. Raulerson's counsel that Mr. Raulerson did not have a conscience and was not suffering from any mental disturbance as a basis for imposing death. T. Tr. 539-540, 541-542, 548. The jury recommended the death penalty by a vote of eight to four on August 7. T. Tr. 556.

The circuit court ordered a presentence investigation and conducted a sentencing proceeding on August 20, 1975. Counsel for Mr. Raulerson again failed to argue for his life, saying "it would do little good to talk of mitigation in this case" and "anything we might say would not change what you might be doing today." Tr. of August 20, 1975 hearing at 8. The circuit court then sentenced Mr. Raulerson to death. R. App. I 34-36.

Mr. Raulerson's death sentence was vacated and the case remanded to the state court for a new sentencing hearing on May 9, 1980. Raulerson v. Wainwright, 508 F. Supp. 381 (M.D. Fla. 1980). Mr. Raulerson was represented at the time by his appellate counsel, David J. Busch, an assistant public defender located in Tallahassee. Mr. Busch moved to withdraw as Mr. Raulerson's counsel at a hearing on a motion for post-conviction relief

held in the state circuit court on May 14, 1980. Mr. Busch asserted his competency was under attack, that he needed to testify as a witness, and that he did not know if he was defending himself or Mr. Raulerson. Tr. of May 14, 1980 hearing at 4-5, 54-57. Nevertheless, the court denied the motion, Id. at 63-64, and Mr. Busch continued to represent Mr. Raulerson in subsequent proceedings.

Although the State had initially indicated that it was going to appeal the order of the federal district court granting habeas corpus relief, D. Ct. Tr. 112-113, it abruptly changed its strategy and decided to have a second sentencing hearing. This change of strategy was not revealed to Mr. Busch until a hearing in state court on July 15, 1980. Tr. July 15, 1980 hearing 3, 10, 113, 116, 117. A motion by Mr. Raulerson to act as co-counsel was denied by the Court at the hearing. Id. at 15-16.

On July 18, 1980, Mr. Raulerson wrote a letter to the trial judge expressing his dissatisfaction with Mr. Busch and making a motion to appear pro se at the second sentencing hearing, citing Faretta v. California, 422 U.S. 806 (1975), PCR R. II at 6, Pet. Ex. 3, admitted in district court below. The state court provided a copy of the letter to counsel for both sides, but took no other action prior to the second sentencing hearing.

At the start of the sentencing hearing, the court told Mr. Raulerson it had determined that "the law is pretty clear, that in the State of Florida, a defendant is entitled to represent himself along with counsel" and that if Mr. Raulerson "continues to wish to participate in the representation of himself" it would allow him to participate as co-counsel. Tr. of August 11-12, 1980 hearing at 6-7. However, during the hearing, the court again reversed itself and ruled that Mr. Raulerson could not be co-counsel. Id. at 186-188.

The second sentencing hearing was held on August 11 and 12, 1980. Although defense counsel had advised the court prior to the new sentencing hearing that he needed more time because he had been preparing for an appeal rather than resentencing (Tr. of

July 15 hearing at 3, 4, 12), filed a written motion for continuance prior to the hearing, (R. App. II 58-60), and announced that he was not ready at the start of the hearing (Tr. of August 11-12 hearing at 7), the court denied a motion for continuance. Id. In announcing that they were not ready at the commencement of the sentencing hearing, counsel advised the court that they had met the witnesses they were to present for the first time on the day of the hearing. Tr. of August 11-12, 1980 hearing at 9. Nevertheless, counsel offered six witnesses who testified to Mr. Raulerson's difficult and troubled childhood, his excellent work record, his strong family ties, and his good prospects for rehabilitation. The state offered no evidence to rebut or to contradict that offered by petitioner. Mr. Raulerson's attorneys stated at the conclusion of the hearing that they were too exhausted and unprepared to give a closing argument. Tr. of August 11-12, 1980, resentencing at 260-266. As a result, no argument for life was ever presented on behalf of Mr. Raulerson at any sentencing hearing.

The circuit court, sentenced Mr. Raulerson to death, finding five aggravating circumstances[2] and no mitigating circumstances. It concluded that none of the evidence offered on petitioner's behalf established mitigating circumstances, stating:

> The Court has examined and considered the evidence to determine whether there are circumstances, other than those specified in Sec. 921.141(6), Fla. Stats., which would mitigate the murder committed by the Defendant herein. The Court finds that there are no such non-statutory mitigating circumstances within the meaning of Lockett v. Ohio, 438 U.S. 586...

R. App. II 89.

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2. The court found the following aggravating circumstances set out in Fla. Stats. Sec. 921.141(5): that petitioner created a great risk of death to many persons, that the murder was committed immediately after the rape, that the murder was committed in an effort to avoid lawful arrest, that the murder was committed for pecuniary gain, that the murder was especially heinous, atrocious or cruel. R. App. II at 84-86.

On appeal, the Florida Supreme Court concluded that the trial court had erred in finding the killing heinous, atrocious, and cruel, Raulerson v. State, 420 So.2d at 571. The court held the error harmless, however, because there was no finding of mitigating circumstances. Id. at 572.

REASONS FOR GRANTING THE WRIT

This capital case involves several important issues which should be decided by this Court. The decision of the United States Court of Appeals for the Eleventh Circuit is inconsistent with the decisions of this Court and conflicts with the decisions of other federal courts of appeals and state courts of last resort. It presents constitutional issues of fundamental importance. Therefore, this Court should issue a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit.

I. THE DECISION OF THE ELEVENTH CIRCUIT FUNDAMENTALLY ALTERED THE SUBSTANTIVE AND PROCEDURAL STANDARDS GOVERNING A DEFENDANT'S RIGHT TO REPRESENT HIMSELF, CONTRARY TO THE DECISIONS OF THIS COURT AND PRECEDENT ESTABLISHED BY OTHER CIRCUIT COURTS OF APPEALS.

Twenty-three days prior to his capital sentencing proceeding in 1980, Mr. Raulerson moved the trial court to proceed pro se. PCR. R. II at 6. Mr. Raulerson went so far as to cite Faretta v. California, 422 U.S. 806 (1975), as authority in support of his motion. Despite his request, Mr. Raulerson was never permitted to conduct his own defense. Nor was a hearing ever held to determine the knowing and intelligent character of his decision. As a result, this Court should grant certiorari to resolve three questions. First, certiorari is necessary to resolve a conflict among the circuits concerning what constitutes a sufficiently unequivocal assertion of the right to proceed pro se. Second, this Court should grant certiorari to establish clearly the precise procedures which a trial court must follow when a defendant asserts the right to represent himself. Finally, certiorari is appropriate to consider whether the court below properly ruled that Mr. Raulerson's reliance upon the trial court's erroneous

understanding of the law may later be construed as a waiver of constitutional rights.

A. The decision below conflicts with the standards in other circuits for determining the degree of unequivocality necessary to find an assertion of the Sixth Amendment right to proceed pro se.

In Faretta, this Court recognized that a defendant's constitutionally protected right to represent himself is triggered once he unequivocally expresses a desire to proceed pro se. At that point the Sixth Amendment requires an inquiry to determine whether the decision is voluntary and intelligently made, and if it is, a defendant must be permitted to represent himself. Faretta, 422 U.S. at 835. Here, Mr. Raulerson expressed his desire to represent himself on July 18, 1980, some three weeks before the scheduled penalty proceeding, in a letter to the court in which he specifically moved to represent himself:

> Upon calling [court-appointed counsel] Mr. Busch today I am met with cold indifference. . . .
>
> With these things to your attention I wish to make motions to:
>
> 1. appear pro se (Faretta vs. California) 95 S. Ct. 2525. . . . I cannot persist being no part of my defense. . . .

PCR. R. II at 6-7.

As noted by the dissent below, it is difficult to characterize Mr. Raulerson's motion as anything other than an unequivocal request to proceed pro se. Raulerson, 732 F.2d at 813-814 (Tuttle, J., concurring and dissenting). Yet, the majority did characterize the request as equivocal, based not on anything appearing in the record at the time the motion was made, but instead relying on two subsequent events to infer that Mr. Raulerson's request lacked sufficient clarity to implicate the Sixth Amendment: first, Mr. Raulerson's failure to renew his motion after the court advised him that "the law is pretty clear, that . . . a defendant is entitled to represent himself along with counsel", Tr. of August 11-12, 1980 hearing at 6-7; and, second, Mr. Raulerson's failure to cooperate at a

Faretta-type inquiry in a collateral matter six months after the sentencing hearing.

Some elaboration on the facts upon which the court of appeals below relied is necessary to demonstrate the extent to which its decision marks a departure from the precedents of this Court. Instead of conducting a Faretta inquiry at the time Mr. Raulerson moved to represent himself, the trial court advised Mr. Raulerson that the law only permitted him to act as co-counsel and ruled that Mr. Raulerson could proceed as co-counsel. Tr. of August 11-12, 1980 hearing at 6-7. In the course of the sentencing hearing, however, the trial court reversed itself and Mr. Raulerson was stripped of his status after the prosecution pointed out that the judge was relying on a state decision that had been overturned. Id. at 186-188.

The second basis relied upon by the court below to find that Mr. Raulerson's assertion was equivocal was even less closely related to his initial motion to proceed pro se. On February 6, 1981, some six months after he had been sentenced to death, a hearing was held because Mr. Raulerson had expressed a desire to discharge appellate counsel because of the latter's unwillingness to pursue the Faretta issue on appeal. At that time the court began an inquiry into whether Mr. Raulerson could retain counsel, could rely on inmate legal assistance, and whether he had sufficient access to a law library to litigate his own appeal. Tr. of February 6, 1981 hearing at 8-14. Ultimately, Mr. Raulerson responded to the inquiry by walking out, a fact which the court of appeals below viewed as evidence of the equivocality of his assertion of the right to represent himself six months before. Raulerson, 732 F.2d at 808-809. As noted by the dissent, it defies logic to assume that Mr. Raulerson would have acted in the manner he did had the court initiated a Faretta-type inquiry at the proper time, when the motion was first made. Id. at 814. Nor, as the dissent reasoned, is it reasonable to characterize Mr. Raulerson's position as being ambiguous when "[w]hatever vacillation appears in the record as it now stands was . . .

the fault of the trial judge, whose vacillation could hardly be expected to have been treated by a non-lawyer defendant any differently than it was." Id.

By relying on Mr. Raulerson's subsequent conduct to characterize his assertion as ambiguous, the circuit court adopted a rule which would circumvent the procedures which this Court has clearly mandated once a question of self-representation emerges. Rather than an admonition concerning the "dangers and disadvantages of self-representation," followed by a determination on the record that the "traditional benefits associated with the right to counsel" were being knowingly relinquished, Faretta, 422 U.S. at 835, the rule announced below would permit a trial court to forgo ruling, only to later conclude that the accused had forfeited the right to proceed on his own behalf due to unknowing inaction. Such insolicitude is clearly untenable with respect to the protection of Sixth Amendment rights, see, Schneckloth v. Bustamonte, 412 U.S. 218, 236-242 (1973), and completely inconsistent with this Court's decision in Faretta.

In addition, the circuit court's reliance on events which were remote in time and character to Mr. Raulerson's initial assertion, establishes a standard of unequivocality vastly higher than that employed in other circuits. Every circuit to consider the issue has concluded that the point at which a request to proceed pro se translates into an exercise of a Faretta right must be settled based on the language of the request per se, not subsequent developments. For example, state and federal courts have considered the following to represent an assertion of the right: "Your Honor, if I feel that the case must go on, I want to be able to act as my own attorney. Would you give me permission, sir?" United States ex rel. Maldonado v. Denno, 348 F.2d [illegible], 15 n. 1 (2d Cir. 1965); a written motion to dismiss appointed counsel and defend pro se, Scott v. Wainwright, 617 F.2d 99 (5th Cir. 1980); an oral statement, "Your Honor, I am defending myself and I feel that relative to the motions that I filed, that they can be heard without the transcript." Wiggins v. Estelle,

681 F.2d 266, 269 n. 4 (5th Cir. 1982), reversed on other grounds sub nom., McKaskle v. Wiggins, ___ U.S. ___, 79 L.Ed.2d 122 (1984); a declaration that "I would rather not have the gentleman with me, Your Honor. I would rather handle it myself and let it go." Chapman v. United States, 553 F.2d 886, 889 (5th Cir. 1977); an oral request coupled with an appropriate citation to legal authority, People v. Anderson, 398 Mich. 361, 247 N.W. 857, 860-861 (1976); and, even informal letters from an accused when coupled with a motion from the attorney of record seeking leave to withdraw. Brown v. Wainwright, 665 F.2d 607 (5th Cir. 1982) (en banc).

In contrast with the decision below, where state and federal courts have found putative assertions too ambiguous to implicate the right to self-representation, they have done so based on the character of the request itself. For example, "Well, I would rather represent myself," was deemed insufficient in the context of a discussion of the defendant's inability to retain counsel. Anderson v. State, 370 N.E.2d 318, 320 (Ind. 1977). Similarly, expressions of dissatisfaction with the performance of a particular counsel have been viewed as inadequate. Moreno v. Estelle, 717 F.2d 171, 173-74 (5th Cir. 1983). The requisite unequivocal assertion of the right to proceed pro se has been found lacking where the request is limited to a single motion, Meeks v. Craven, 482 F.2d 465, 467 (9th Cir. 1983), or is joined with requests for alternate relief. United States v. Weisz, 718 F.2d 413 (D.C. Cir. 1983) cert. denied, ___ U.S. ___, 104 S. Ct. 1285 (1984) (request for self-representation with assigned counsel or stand-by counsel other than a particular attorney).

Clearly, therefore, by going beyond the character of Mr. Raulerson's assertion itself to subsequent events that, in large part resulted from the trial court's failure to follow the dictates of Faretta, the circuit court has radically altered the accepted standard governing the assertion of the right to self-representation. The alteration, in fact, is so substantial as to approach that which other circuits rely upon in assessing when

the right has been abandoned following its initial unequivocal assertion and recognition. See, United States v. Montgomery, 529 F.2d 1404, 1405 (10th Cir. 1976) (properly asserted right to proceed pro se relinquished where defendant permitted attorney to plea bargain on his behalf). Such a perspective, however, is hardly the appropriate measure for whether or not an accused's assertion of the right in the first instance was properly respected. United States v. Dougherty, 473 F.2d 1113, 1117-18 (D.C. Cir. 1972) (defendants' participation in trial as co-counsel did not obviate district court's error in not allowing defendants to represent themselves).

Therefore, a writ of certiorari to review the decision below should be issued.

B. Contrary to the decision below, a request for self-representation cannot be dismissed without a full examination of the character of the assertion and a reasoned determination that it is involuntary or unknowing.

Prior to the ruling below, it appeared relatively settled that a court could not indiscriminately impose attorney representation over a defendant's request to proceed pro se. Once the right was asserted, the court's powers were limited to advising a defendant of the hazards of pro se litigation followed by an inquiry to determine if the defendant had waived counsel in a voluntary and intelligent fashion. Faretta, 422 U.S. at 807; Piankhy v. Cuyler, 703 F.2d 728, 732 (3d Cir. 1983); United States v. Harlan, 696 F.2d 5, 6 (1st Cir. 1982); Brown, 665 F.2d at 610; Scott, 617 F.2d at 102; Chapman, 553 F.2d at 889; cf. United States v. Kimmel, 672 F.2d 720, 722-723 (9th Cir. 1982).

In the case at bar, however, the trial court did none of this. Instead, at Mr. Raulerson's sentencing proceeding the court announced that because of its misunderstanding of the law it was reversing itself and granting an earlier motion for Mr. Raulerson to act as co-counsel. The court made absolutely no inquiry at to Mr. Raulerson's motion to appear pro se and without

counsel. Tr. of August 11, 1980 hearing at 6-7. However, the first time Mr. Raulerson attempted to address the court, the court again reversed itself and ruled that he could not serve as co-counsel. Id. at 186-188.

The denial of the procedures established in Faretta and followed by other courts of appeals could not be any clearer. At no time prior to the resentencing was there any voir dire or other examination to determine if Mr. Raulerson could represent himself. As recognized by the dissent, "the failure of the trial court to respond affirmatively to his demand for the right to represent himself as required in Faretta was an absolute and final denial of that right. . ." Raulerson, 732 F.2d at 814. Accordingly, this Court should grant certiorari to resolve once and for all the procedural requirements which must be satisfied before a court may override a defendant's assertion of the Sixth Amendment right to self-representation.

C. A finding of waiver cannot be predicated upon a defendant's reliance on the trial court's erroneous understanding of the law.

Mr. Raulerson's trial court failed to comply with Faretta and its progeny. Instead, at the start of the sentencing hearing, the court told Mr. Raulerson that it had determined the "the law is pretty clear, that in the State of Florida, a defendant is entitled to represent himself along with counsel" and that if Mr. Raulerson "continues to wish to participate in the representation of himself" it would allow him to act as co-counsel. Tr. of August 11-12, 1980 hearing at 6-7. The trial court then reversed a ruling it had made before ever receiving the motion to proceed pro se and allowed Mr. Raulerson to act as co-counsel.[3] However, the court reversed itself again during the hearing and ruled that Mr. Raulerson could not be co-counsel when it found that its view of the law was erroneous. Id. at 186-188.

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3. The trial court had denied Mr. Raulerson's request to act as co-counsel at a hearing on July 15, 1980, three days before Mr. Raulerson's letter moving that he be allowed to proceed pro se. Tr. of July 15, 1980 hearing at 15-16.

Thus, the state court not only failed to follow Faretta, it also gave Mr. Raulerson an erroneous statement of the law at the start of the sentencing proceeding and then acted upon that erroneous understanding even though Faretta had been cited to it in the motion to proceed pro se. Nevertheless, by a two to one majority, the court below upheld the denial of Mr. Raulerson's right of self-representation based largely on a finding that by failing to renew the motion, Mr. Raulerson waived the right. Raulerson, 732 F.2d at 808-809.

As applied, the circuit court's concept of waiver clearly imposes a greater burden on an accused than that envisioned by Faretta. Under the rule announced below it is not enough that a defendant make clear his intention to proceed on his own behalf. Instead, he must continue to reassert his right even after a judge has instructed him that his request is not in conformity with the law. Applying the logic of the court below to an analogous area, it would not be enough for a jailed defendant to request civilian dress for trial. See Estelle v. Williams, 425 U.S. 501 (1976). Instead, given the reasoning of the court of appeals below, his right to due process would only be preserved if he ran the risk of contempt and refused to participate in the trial process until something other than jail garb was made available.

In sum, the notion of waiver applied below is as ludicrous as it is burdensome on the exercise of constitutional rights. Certiorari is appropriate to clarify that a defendant's reliance on a trial court's misstatement of the law cannot subsequently be transformed into a basis for inferring a knowing and intelligent abandonment of Sixth Amendment rights.

II. THE DECISION OF THE ELEVENTH CIRCUIT CONFLICTS WITH THE HOLDINGS OF THIS COURT THAT THE EIGHTH AND FOURTEENTH AMENDMENTS REQUIRE THAT MITIGATING CIRCUMSTANCES BE INCLUDED IN THE WEIGHING PROCESS AND THAT THE STATES APPLY THEIR CAPITAL PUNISHMENT STATUTES IN A CONSISTENT MANNER

This Court should grant certiorari because the decision of the Court of Appeals for the Eleventh Circuit conflicts with the principles enunciated in Lockett v. Ohio, 438 U.S. 586 (1978), and Eddings v. Oklahoma, 455 U.S. 104 (1982). First, the circuit court held that the trial court's refusal to consider specific factors as mitigating circumstances was proper because what may be mitigating to one sentencing authority may well not be for another. Hence, based on the reasoning below, evidence which may be treated as mitigating in one case may be properly ignored in another. Second, the circuit court held that even if a mitigating circumstance is identified, a state court may give it "no weight at all." Raulerson, 732 F.2d at 807. Both aspects of the decision contravene the requirements of the Eighth and Fourteenth Amendments as set forth in Lockett and Eddings. This court should issue a writ of certiorari to review the decision below, and provide guidance to the lower courts in the determination and weighing of mitigating circumstances.

At the second sentencing hearing in 1980, Mr. Raulerson presented unrebutted testimony that clearly established several mitigating circumstances. Witnesses testified that he had a difficult upbringing in that he was abandoned by his father, placed in a home by his mother, and later adopted by his grandparents; that he had an excellent work record over a six-year period in Carrollton, Ohio, where he worked in a restaurant; that he suffered a traumatic incident in his life when the man who took him in and became a father figure to him was shot at the restaurant which he ran with Mr. Raulerson and died in Mr. Raulerson's arms; that Mr. Raulerson struggled for a year to keep the restaurant open after the murder of his stepfather, but it was closed because of back taxes owed; that Mr. Raulerson had an interest in his family and had gone to considerable efforts to locate his brothers and sisters who had been adopted by other

families; that he had a wife and a small child; that he had an interest in religion; that after working for several years in Ohio and marrying his wife, he returned to Georgia, met with state officials, and had a prior conviction for larceny commuted by the state's board of pardons and parole; and that he was a good prospect for rehabilitation.

The trial court failed to include this evidence in weighing mitigating circumstances against aggravating circumstances, holding that a poor childhood, family ties, an excellent work record, good prospects for rehabilitation and other factors established by the undisputed evidence were not "mitigating circumstances within the meaning of Lockett v. Ohio . . . . " R. App. II at 89:

> The Court has examined and considered the evidence to determine whether there are circumstances, other than those specified [in the Florida statute], which would mitigate the murder committed by the Defendant herein. The Court finds that there are no such non-statutory mitigating circumstances within the meaning of Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973, 98 S.Ct. 2954.

Mr. Raulerson contended in the courts below that the trial court committed constitutional error in excluding from the weighing process factors which were established by uncontested evidence[4] and have been recognized by state and federal courts as valid mitigating circumstances as a matter of law.[5]

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4. This is not a case where the evidence is insufficient to establish the presence of a mitigating circumstance. Petitioner agrees that a sentencer may exclude from consideration mitigating circumstances not supported by the evidence. See State v. Stokes, 304 S.E.2d 184, 198 (N.C. 1983) (holding no error in failure to consider unproven mitigating circumstances); Moody v. State, 418 So.2d 989, 995 (Fla. 1982) (evidence insufficient to establish mitigating circumstances of mental and emotional defects). In this case, however, the trial court did not find that the circumstances were not supported by the evidence, because they were, but rather that they did not constitute mitigating circumstances.

5. See Eddings v. Oklahoma, 455 U.S. at 107, 114-15 (troubled youth and difficult upbringing); McCampbell v. State, 421 So.2d 1072, 1075 (Fla. 1982) (excellent work record, family background, and potential for rehabilitation); Simmons v. State, 419 So.2d 316, 320 (Fla. 1982) (capacity for rehabilitation); Moody v. State, 418 So.2d 989, 995 (Fla. 1982), cert denied,

(footnote continued on next page)

Nevertheless, the Court of Appeals for the Eleventh Circuit upheld the trial court's refusal to even consider any of the defendant's evidence as mitigating circumstances, stating: "Whether particular evidence, such as the fact that [Mr. Raulerson] had a difficult childhood, is mitigating depends on the evidence in the case as a whole and the views of the sentencing and reviewing judges. What one person may view as mitigating, another may not." Id. at 807 n. 3.[6] In other words, the Eleventh Circuit's rule is that a mitigating circumstance is in the eyes of the beholder.

This rule inevitably leads to arbitrary and capricious sentencing in violation of this Court's consistent pronouncements from Furman v. Georgia, 408 U.S. 238 (1972), through Zant v. Stephens, __U.S.__, 77 L.Ed.2d 235 (1983), that the Eighth and Fourteenth Amendments require that the death penalty be imposed in an "objective, evenhanded and substantially rational way." Zant, 77 L.Ed.2d at 251. Nothing could be more arbitrary than the use of identical generic facts to condemn one man to death

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footnote continued from previous page:

U.S. ___, 103 S.Ct. 1213 (198)(religious beliefs); Neary v. State, 384 So.2d 881, 885-88 (Fla. 1980) (troubled youth and difficult up-bringing); Buckrem v. State, 355 So.2d 111, 113 (Fla. 1978) (excellent work record over substantial period of time); State v. Stokes, 304 S.E.2d 184, 198 (N.C. 1983) (abuse during childhood and no relationship with natural father).

6. The court relied upon Dobbert v. Strickland, 718 F.2d 1518, reh. den., 720 F.2d 1294 (11th Cir. 1983), cert. denied, U.S. ___, 35 Cr.L. 4093 (1984), to reach its decision. In Dobbert it was clear that the trial court had considered the mitigating evidence and simply given it little weight. The trial court in that case had stated '"[t]here are no mitigating circumstances . . . which outweigh any aggravating circumstances"'. Dobbert, 718 F.2d at 1524. The panel's statement regarding the sentencer's discretion to disregard the mitigating evidence thus is completely dicta.

In this case, however, the trial court stated that it did not consider the evidence mitigating, not merely that the evidence did not outweigh the aggravating circumstances. Thus, the opinion below clearly indicates that the Eleventh Circuit has concluded that sentencers have the discretion to disregard mitigating evidence presented by the defendant completely and exclude it from their deliberative processes.

while another is sentenced to life.[7]

The Eleventh Circuit's rule also flatly contradicts this Court's decisions in Lockett v. Ohio and Eddings v. Oklahoma. In Eddings, this Court vacated a death sentence for failure to give independent mitigating weight to evidence similar to but not as extensive as that offered by Mr. Raulerson at his second sentencing hearing. In Eddings, the trial judge, after considering evidence that Eddings was raised without proper guidance, that his parents were divorced, that he lived with his mother who was an alcoholic and probably a prostitute until he was 14, and then lived with his father who used excessive physical punishment, 455 U.S. 107, found Eddings' youth as the only mitigating circumstance. Id. at 108-109. After weighing the three aggravating circumstances against the one mitigating circumstance, the trial judge imposed the death penalty. The Court of Criminal Appeals in reviewing Eddings' death sentence found the evidence "useful in explaining" his behavior, but stated that it did not "excuse" his behavior. 455 U.S. at 113.

This Court, speaking through Mr. Justice Powell, held that the Oklahoma courts had violated Lockett by failing to consider the evidence offered by Eddings in deciding whether to impose death:

> Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider as a matter of law, any relevant mitigating evidence. . . . The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight at all by excluding such evidence from their consideration.

455 U.S. at 114-115 [first emphasis original; second emphasis added].

Precisely the same error occurred in the imposition of

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7. See, e.g., McCampbell v. State, 421 So.2d 1071, 1075 (Fla. 1982) (employment, family background, and potential for rehabilitation identified as mitigating; court vacates death penalty and remands for imposition of life sentence). If the same mitigating factors can be the basis for a sentence less than death in McCambell, but excluded altogether from the weighing process in Raulerson, then the State has failed to guard adequately against the arbitrary and capricious imposition of the death penalty as required by the Eighth Amendment. Proffitt v. Florida, 428 U.S. 242, 251-253 (1976).

sentence and review in the case sub judice. Indeed, two factors present in Mr. Raulerson's case -- his troubled youth and difficult upbringing and the expert opinion as to his potential for rehabilitation -- were also excluded from the weighing process in Eddings. In addition, his excellent work record, religious commitment, solid marriage and fatherhood were all positive attributes of his life that should have been balanced against the aggravating circumstances by the sentencing authority. The Eleventh Circuit's holding that a trial judge may in his discretion choose not to consider such evidence as a mitigating circumstance violates the express holding in Eddings.

The circuit court also held that "the general rule" concerning mitigating circumstances "is that as long as the evidence is evaluated, it properly may be given little weight or no weight at all." 732 F.2d at 807 [emphasis added]. In contrast, in Lockett, this Court emphasized that a capital sentencer could "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record or any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." 438 U.S. at 604. The Eleventh Circuit announced a rule that eviscerates Lockett: so long as evidence of mitigation is presented in the record there is no requirement that it have any impact on the ultimate sentencing decision. The "consideration" of mitigating circumstances mandated by Lockett, however, is more than mere lip service: some weight must be accorded to the evidence, whatever discretion the court may have in the final balancing of aggravating and mitigating circumstances.

The Eleventh Circuit's holding that such evidence can be given "no weight at all" and excluded from the weighing process is directly in conflict with this Court's holding in Eddings that state courts "may not give [mitigating circumstances] no weight." 455 U.S. at 115[8] The conclusion reached by the court of appeals

8. The Court's order for remand states this same view: "On remand, the state courts must consider all relevant mitigating evidence and weigh it against the evidence of the aggravating circumstances. We do not weigh the evidence for them." Id. at 117.

below that mere receipt of the evidence is sufficient to satisfy the Eighth and Fourteenth Amendments, was advanced in the dissenting opinion in Eddings and rejected by the majority. See 455 U.S. at 126 (Burger, C.J., dissenting):

> To be sure, neither the Court of Criminal Appeals nor the trial court labeled Eddings' family background and personality disturbance as "mitigating factors." It is plain to me, however, that this was purely a matter of semantics associated with the rational belief that "evidence in mitigation" must rise to a certain level of persuasiveness before it can be said to constitute a "mitigating circumstance."

However, as stated by Justice O'Connor in her concurring opinion:

> . . . [W]e may not speculate as to whether the trial judge and the Court of Criminal Appeals actually considered all of the mitigating factors and found them insufficient to offset the aggravating circumstances, or whether the difference between this court's opinion and the trial court's treatment of petitioner's evidence is "purely a matter of semantics" as suggested by the dissent. Woodson and Lockett require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court.

455 U.S. at 119.

Here it is far more clear than it was in Eddings that the trial court misconstrued Lockett and applied an unconstitutionally narrow definition of the role of mitigating circumstances in a death penalty proceeding.[9] The trial court's statement that the evidence presented did not "mitigate the murder" indicates that the court limited its consideration of mitigating factors to circumstances surrounding the crime, and not such factors as the background, character and upbringing of Mr. Raulerson. It has been observed that it is "open to debate" whether mitigating circumstances

> refer particularly to circumstances surrounding the commission of the crime and tending to aggravate or mitigate the character of the conduct involved, or

9. In Eddings, the trial court said, "[n]or can the Court in following the law, in my opinion, consider the fact of this young man's violent background." 455 U.S. at 109. Mr. Raulerson's trial judge said the evidence did not constitute "mitigating circumstances within the meaning of Lockett v. Ohio". R. App. II at 89.

> whether such circumstances include also the convict, himself, as an individual, which would include his background, his age, upbringing, and environment or any other matter appropriate to a determination of the degree of culpability. We think that the statute should be given a broader interpretation, particularly in a capital case.

State v. Osborn, 102 Idaho 405, ___, 631 P.2d 187, 197 (1981), quoting from State v. Owen, 73 Idaho 394, 403, 253 P.2d 203, 207-208 (1953), overruled on other grounds, State v. Shepherd, 94 Idaho 227, 486 P.2d 82 (1971). In Osborn, the court held that the failure of the trial court to specify in writing the mitigating circumstances it considered was error because the appeallate court could not "determine whether the lower court overlooked or ignored any raised mitigating factors . . . ." 631 P.2d at 187. Other state courts in applying weighing statutes have similarly held that resentencing is required where it appears the sentencer may have failed to include a clearly established mitigating circumstance in the weighing process. See e.g., State v. Watson, 129 Ariz. 60, __, 628 P.2d 943, 946-947 (1981); Bowers v. State, 468 A.2d 101, 119-120 (Md. 1983); Johnson v. Mayland, 439 A.2d 542, 562 (Md. 1982); State v. Kirkley, 302 S.E.2d 144, 157-158 (N.C. 1983).[10] These decisions are consistent with this Court's decisions in Lockett and Eddings and in conflict with the decision of the Court of Appeals for the Eleventh Circuit in the case sub judice.

That conflict is particularly significant here because in Mr. Raulerson's case the proper identification of mitigating circumstances by the trial court was important not only to ensure the validity of the initial weighing process by the trial judge, but also for appellate review purposes. The Florida Supreme

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10. The Supreme Court of Florida has on occasion also vacated and remanded for resentencing cases in which the sentencer failed to consider mitigating circumstances in the weighing process. See, e.g., Mines v. State, 390 So.2d 332, 337 (Fla. 1980) (evidence regarding mental or emotional disturbance and mental impairment); Simmons v. State, 419 So.2d 316, 320 (Fla. 1982) (remand for resentencing where sentencer did not consider evidence of defendant's capacity for rehabilitation); Moody v. State, 418 So.2d 989, 995 (Fla. 1982) (remanded where unclear whether trial court considered evidence of personality change after service in Vietnam and religious obsession).

Court determined that one aggravating circumstances was improperly relied upon by the trial judge in resentencing Mr. Raulerson to death in 1980. Raulerson v. State, 420 So.2d at 571. Under Florida law, where an improper aggravating circumstance is considered and there are mitigating circumstances, the case must be remanded for resentencing. Sireci v. State, 399 So.2d 964 (Fla. 1981). However, instead of remanding Mr. Raulerson's case to the trial court to reweigh the aggravating and mitigating circumstances, the Florida Supreme Court upheld the sentence of death because no mitigating circumstances were identified by the trial court.

This court should grant certiorari to correct this departure from its applicable decisions and to resolve this conflict between the Court of Appeals for the Eleventh Circuit and state courts of last resort. Since its pronouncement in Woodson v. North Carolina, that capital sentencing schemes may not preclude the sentencer from considering the "compassionate or mitigating factors stemming from the diverse frailties of humankind", 428 U.S. at 304, this Court has, in Lockett and Eddings, strictly enforced this constitutional requirement. This requirement is central to this Court's "insistence that capital punishment be imposed fairly, and with reasonable consistency, or not at all." Eddings, 455 U.S. at 112. Because the Court of Appeals for the Eleventh Circuit has departed from the course charted in this Court's cases, this Court should issue a writ of certiorari to review the decision below.

III. THIS COURT SHOULD GRANT CERTIORARI TO REVERSE THE FAILURE OF THE COURT OF APPEALS TO CONSIDER PETITIONER'S CLAIM THAT HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT HIS ONLY SENTENCING HEARING BEFORE A JURY, OR, IN THE ALTERNATIVE, TO VACATE THE DECISION BELOW AND REMAND THIS CASE IN LIGHT OF STRICKLAND V. WASHINGTON

In deciding Mr. Raulerson's claim of ineffective assistance of counsel, the Court of Appeals for the Eleventh Circuit did not decide the question of counsel's effectiveness during the only sentencing hearing he had before a jury "because the sentence resulting from that hearing is not under attack." 732 F.2d at 809. The court's refusal to consider Mr. Raulerson's claim that the representation provided him at the jury sentencing proceedings was below constitutional standards and deprived him of a recommendation of a life sentence is so clearly out of line with the Sixth, Eighth and Fourteenth Amendments that this Court should either review or summarily reverse the decision below.

In addition, the decision of the court of appeals was rendered on May 1, thirteen days before this Court decided Strickland v. Washington, ___ U.S. ___, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). Because counsels' performances at every stage of the state court trial and sentencing proceedings were so deficient that Mr. Raulerson was denied a fair trial and a reliable determination of guilt and sentence, this Court should vacate the decision below and remand this case for consideration in light of Strickland v. Washington.

A. The failure of the court below to consider counsel's effectiveness at the proceeding which resulted in the jury recommendation of death is patently erroneous because it ignores the critical importance of the jury's recommendation under Florida's capital sentencing scheme

By refusing to determine whether Mr. Raulerson was deprived a recommendation of life because of the abject ineffectiveness of

his counsel in 1975,[11] the court of appeals below completely ignored the critical importance of the jury recommendation under Florida's trifurcated capital sentencing system and the requirements of the Sixth, Eighth and Fourteenth Amendments that proceedings leading to a sentence of death be fair and reliable.

The role of the jury's sentencing recommendation under the Florida capital sentencing scheme, Fla. Stats. Sec. 921.141, is critically important in determining the ultimate sentence afforded to one convicted of a capital crime. The Florida Supreme Court has established that:

> A jury recommendation under our trifurcated death penalty statute should be given great weight. In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.

Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). The Florida Supreme Court additionally scrutinizes with special care any death sentence that is imposed after a jury has recommended life.[12]

This Court has recognized the significant safeguards afforded to a capital defendant by the jury's advisory sentence and the accompanying Tedder standard in Florida. See Spaziano v. Florida, ___ U.S. ___, 35 Cr.L. 3199, 3204 (1984); Barclay v. Florida, ___ U.S. ___, 77 L.Ed.2d 1134, 1151-52 (1983) (Stevens, J., concurring); Dobbert v. Florida, 432 U.S. 282, 294-295 (1977); Proffitt v. Florida, 428 U.S. 242, 249 (1976)

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11. Despite the pathetic performance of Mr. Raulerson's counsel during his jury sentencing hearing, described in subsection B infra, four jurors voted to spare Mr. Raulerson's life. The other eight recommended the death penalty, and this recommendation was followed by the trial judge on August 20, 1975. When Mr. Raulerson was granted habeas corpus relief in 1980, the district court specified that resentencing could be "without the necessity of an advisory jury," Raulerson v. Wainwright, 508 F.Supp. at 385, since the Gardner violation upon which relief was granted occured after the jury's recommendation. Despite Mr. Raulerson's motion seeking a new jury sentencing, no new jury hearing was held in 1980.

12. See e.g., Gilven v. State, 418 So.2d 996, 999 (Fla. 1982); Lewis v. State, 398 So.2d 432, 438 (Fla. 1981); Williams v. State, 386 So.2d 538, 542 (Fla. 1980); McCaskill v. State, 344 So.2d 1276, 1280 (Fla. 1977); Burch v. State, 343 So.2d 831, 834 (Fla. 1977).

(joint opinion of Stewart, Powell, and Stevens, JJ.). As this Court observed in Spaziano, the Florida Supreme Court takes the sentencing jury's recommendation seriously and "has not hesitated to reverse a trial court if it derogates the jury's role." Id., at 3204. See also, e.g., Richardson v. State, 437 So.2d 1091, 1095 (Fla. 1983); Miller v. State, 332 So.2d 65, 67-68 (Fla. 1976).

Notwithstanding the clear, critical role of the jury sentencing recommendation in Florida's capital sentencing scheme, the Eleventh Circuit refused to consider whether Mr. Raulerson had been denied effective assistance of counsel at his only sentencing hearing "because the sentence resulting from that proceeding is not under attack." Raulerson v Wainwright, 732 F.2d at 809.[13] This decision effectively eliminates the attendant safeguards of the advisory jury sentence provided for in the Florida statute and case law and approved by this Court in Proffitt, Barclay, and Spaziano. Moreover, by refusing to determine whether Mr. Raulerson's Sixth Amendment rights were violated at a critical stage, the court of appeals below failed to decide Mr. Raulerson's challenge to the reliability of one stage of the proceedings which led to the death penalty.

It is well established that a defendant is entitled to effective assistance of counsel at every critical stage of a criminal proceeding. See United States v. Wade, 388 U.S. 218 (1967)(the Sixth Amendment guaranty of the assistance of counsel applies to "critical" stages of criminal proceedings). This Court has explicitly recognized that a capital defendant is entitled to effective assitance of counsel during a capital sentencing proceeding in Florida's system, Strickland v. Washington, 80 L.Ed.2d at 693; Gardner v. Florida, 430 U.S. at 358,

13. Under the analysis of law taken by the court below in this case, a defendant would never be able to challenge the effectiveness of his counsel at his sentencing before the jury since it is always the sentence ultimately imposed by the judge that is "under attack". This analysis contravenes the long line of cases where courts have made determinations of whether a defendant's right to effective assistance of counsel was violated at the jury sentencing hearing. See n. 14 infra.

and both state and federal courts have sought to protect this right.[14]

The refusal below to determine whether Mr. Raulerson's Sixth and Fourteenth Amendment rights were violated during the only sentencing hearing before a jury improperly insulates counsel's performance at this critical stage from the standards of the Sixth, Eighth and Fourteenth Amendments.

"An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable . . ." Strickland v. Washington, 80 L.Ed.2d at 679. This Court has determined that the "purpose of the Sixth Amendment guaranty of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding." Id., at 696. This Court has written at length to articulate standards whereby lower courts can evaluate whether capital defendants have been provided with the necessary assistance required by the Sixth Amendment. Consequently, there is no justification for the lower court's refusal to make a determination of Mr. Raulerson's claim of ineffectiveness. As this Court stated in Strickland:

> [T]he Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial. The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause. . . .

Id., at 691. The Eleventh Circuit's refusal to consider Mr.

14. Florida state courts have reviewed dozens of claims of ineffective assistance of counsel during the jury sentencing hearing in order to protect a capital defendant's Sixth Amendment rights. See, e.g., McCrae v. Wainwright, 439 So.2d 868 (Fla. 1983); Jackson v. State, 437 So.2d 147 (Fla. 1983), cert. denied, ___ U.S. ___, 79 L.Ed.2d 246 (1984); Francois v. State, 423 So.2d 357 (Fla. 1982); Straight v. Wainwright, 422 So.2d 827 (Fla. 1982). Federal courts, including the court of appeals below, have also reviewed the performance of counsel before Florida's advisory jury in deciding Sixth Amendment challenges. See, e.g., King v. Strickland, 714 F.2d 1481, 1490-1491 (11th Cir. 1983), vacated and remanded for reconsideration in light of Strickland, ___ U.S. ___, 35 Cr. L. Rptr. 4061 (1984); Douglas v. Wainwright, 714 F.2d 1532, 1554 (11th Cir. 1983), vacated and remanded for reconsideration in light of Strickland, ___ U.S. ___, 35 Cr. L. Rptr. 4089 (1984).

Raulerson's ineffectiveness claim constitutes a clear violation of the principles of Strickland and the long line of cases protecting a defendant's right to representation at every critical stage of a criminal proceeding and should be reviewed by this Court or summarily reversed.

B. Because Mr. Raulerson was denied a reliable adversarial determination of guilt and sentence, this Court should vacate the decision below and remand for consideration in light of Strickland v. Washington

In Strickland v. Washington, this Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 80 L.Ed.2d at 694. A habeas corpus petitioner is entitled to relief where his counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and counsel's deficiencies result in "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would be different." 80 L.Ed.2d at 693, 698. The Court added that, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 698.

Mr. Raulerson was represented at this trial and sentencing proceedings in 1975 by Walter R. Stedeford, a Jacksonville attorney. He was represented on direct appeal by David J. Busch, an assistant public defender in Tallahassee, who was assigned to appellate responsibilities in cases arising in approximately 37 counties within the jurisdiction of Florida's First District Court of Appeal. D.Ct. Tr. 101. Mr. Busch, with the assistance of another appellate public defender in Tallahassee, represented Mr. Raulerson at his second sentencing hearing in 1980. As acknowledged at some point by each of these attorneys, their minimal efforts on behalf of James David Raulerson fell woefully short of the constitutional standard for effective assistance of counsel, and left Mr. Raulerson virtually without any professional assistance throughout the proceedings that led to his conviction and sentence of death. Mr. Raulerson's attorney in 1975 performed the role of spectator, rather than counsel. And his attorneys at the second sentencing hearing in 1980 were so completely unprepared that their performance made a mockery of the concept of advocacy.

1. Mr. Stedeford's Representation in 1975

Walter Stedeford, petitioner's initial counsel, conducted virtually no investigation prior to Mr. Raulerson's trial in 1975, failed to memorialize what little work he did on the case, and provided only the most perfunctory representation at the trial and sentencing proceedings.

The only pretrial investigation with regard to the circumstances of the offense by Mr. Stedeford, apart from discussions with his client which were not memorialized, was one visit to the scene of the crime and the deposing of ten of approximately one hundred witnesses listed on the State's response to discovery. D. Ct. Tr. 26, 29. All ten witnesses were examined on the same date, July 24, 1975, starting at 1 p.m. Id. at 26. Mr. Stedeford did not have the depositions transcribed and had no notes or memoranda regarding what was said by any of the witnesses examined. Id. at 27. He had no recollection of how long the depositions took or what any of the witnesses said. Id. at 28. Mr. Stedeford testified that he did not seek to interview any of the other witnesses because he assumed no one would cooperate with him because of the controversial nature of the case. Id. at 67.

Mr. Stedeford never obtained arrest reports, a copy of the autopsy, or other documents relating to the circumstances of the offense. He did not retain an investigator, law clerk, social worker or any expert witnesses to assist him in the defense of the case. D. Ct. Tr. 19, 24.

Although there was extensive pretrial publicity, Mr. Stedeford did no legal research regarding change of venue and did not file a motion for a change of venue. D. Ct. Tr. 37. He said that it was his understanding from talking to the trial judge that venue would be changed only if the responses of prospective jurors on voir dire indicated it would be necessary. Id. at 85.

He was not aware of the holding in Rideau v. Louisiana, 373 U.S. 723, 726-27 (1963), or of other cases, that prejudice could be presumed when pretrial publicity is sufficiently prejudicial and inflammatory and saturates the community. See Coleman v. Zant, 708 F.2d 541, 544 (11th Cir. 1983).

Although Mr. Stedeford claimed that he visited Mr. Raulerson at the hospital and jail on a number of occasions, he had no record of the number of interviews. D. Ct. Tr. 29. His file did not contain a single note memorializing an interview with Mr. Raulerson, any member of his family, any witness or any other person. Id. at 31. He did not obtain a copy of his client's arrest record. Id. at 84. Mr. Stedeford did not contact Mr. Raulerson's mother, the grandmother and grandfather who reared him, or other relatives or acquaintances to obtain information about the petitioner. D. Ct. Tr. 31-34. Although counsel was provided with a report of a psychiatrist indicating that Mr. Raulerson had been employed in the restaurant business, in a factory as a welder, in a cotton mill and at a gas station and had never been fired from a job, and that he was a member of Bethlehem Baptist Church, counsel made no effort to verify any of this information or present it at the sentencing phase of the trial. R. App. I at 8, D. Ct. Tr. 46-47. He made no effort to obtain any school or employment records regarding his client. D. Ct. Tr. 34.[15]

15. Although Mr. Stedeford was provided copies of the letters of the two psychiatrists to the trial court reporting their findings regarding the competency and sanity of Mr. Raulerson, there were no notes or other indication that counsel ever provided information to the doctors about his client. D. Ct. Tr. 43. Although one doctor stated in his report that Mr. Raulerson was given to compulsive acting out when under the influence of alcohol but that Mr. Raulerson had denied excessive alcohol use, Mr. Stedeford made no effort to determine whether his client in fact abused drugs or alcohol. D. Ct. Tr. 48. Mr. Stedeford testified that he had "no idea" what the diagnoses reached by the two psychiatrists meant. Id. at 49, 52-53. Nevertheless, he did no research in the psychological literature with regard to the diagnoses. Id. at 50. Mr. Stedeford did not recall asking either psychiatrist about the psychological ramifications of Mr. Raulerson's discovery during childhood that a person that he thought was his aunt was actually his mother who had abandoned him not long after his birth, or the effect of his stepfather dying in his arms after being shot. D. Ct. Tr. 45, 47. No testimony about these facts was presented at the sentencing phase of trial.

During trial, counsel conducted only a perfunctory voir dire examination, engaged in minimal cross-examination of all but one of the State's witnesses, presented no evidence at the guilt-innocence phase, and argued in closing that although Mr. Raulerson was engaged in the offense, he should be acquitted because the State had failed to prove the identity of the victim and that the offense occurred before midnight and not on the date specified on the indictment. See T. Tr. 53-55, 365-375.[16]

Mr. Stedeford also failed to make objections or legal argument throughout the trial and sentencing hearing. See, e.g., T. Tr. 340, 359, 360, 384, 413, 455, 497-98. At the sentencing phase, he failed to object to the testimony of two witnesses about petitioner's alleged participation in a robbery in Alabama which was irrelevant to any aggravating circumstance. T. Tr. 421-440. He also failed to object to the state's improper cross-examination of Mr. Raulerson which suggested in the questions that Mr. Raulerson had committed a number of other robberies. T. Tr. 516.

Not surprisingly, after the complete lack of zeal and advocacy on his behalf during the guilt-innocence phase of the trial, Mr. Raulerson became concerned and urged counsel to offer witnesses during the sentencing phase, according to Mr. Stedeford. D. Ct. Tr. 87. However, because he had conducted no investigation into Mr. Raulerson's background, Mr. Stedeford was unable to present any of a wealth of compelling mitigating evidence which was available. Instead, in addition to Mr. Raulerson, Mr. Stedeford presented three doctors who had examined Mr. Raulerson after his arrest. Two of those doctors were psy-

16. Robert J. Link testified before the district court below, based on his experience as a criminal lawyer and his observation and supervision of numerous other attorneys in the defense of criminal cases, that Mr. Stedeford's investigation fell "substantially below par" and that he failed to develop facts which would have enabled him to challenge testimony by the police officers. D. Ct. Tr. 207, 211-214. Mr. Link testified that such a factual development would have enabled counsel to make a credible closing argument to the jury, instead of the one he gave which was so completely frivolous that it completely destroyed his credibility. Id. at 204.

chiatrists. However, neither was able to provide testimony helpful to Mr. Raulerson in mitigation because they had not been provided with any information about his background by counsel and had not been asked by counsel to explore areas of mitigation before testifying. Instead, they had examined Mr. Raulerson for the limited purpose of determining his competency for trial and sanity at the time of the crime. Neither was an issue at the sentencing hearing or trial.[17]

In his examination of the two psychiatrists, Mr. Stedeford brought out information harmful to his client's interest: the opinions of the doctors that Mr. Raulerson was an "antisocial personality," had a "defective conscience," was a "passive-aggressive personality," and may have been malingering. T. Tr. 459-476, 485-489, 490-494, 499-516. Counsel did not bring out any of the favorable information about his client contained in the doctors' reports.

Mr. Stedeford also called Mr. Raulerson as a witness and examined him superficially about his family and work history, T. Tr. 503-507, before bringing out that he had taken illegal drugs and smoked marijuana. T. Tr. 514-515. Mr. Stedeford could offer no explanation as to why he brought out this harmful information regarding his client. D. Ct. Tr. 91-92.

Mr. Stedeford offered no reason to the jury for presenting any of the evidence he had offered. However, the prosecution argued the defense evidence in seeking the death penalty. T. Tr. 539-540, 541-542, 548. Mr. Stedeford's closing remarks cannot be called "argument." He made no plea for Mr. Raulerson's life. He

17. William P. White, III, an attorney experienced in the defense of capital cases, testified before the district court below regarding preparation for the sentencing phase of a capital trial. Mr. White testified that defense counsel must advise and work with psychiatrists and other experts in order to obtain explanations of the psychological ramifications of various events in a person's life for the penalty phase of a capital trial. D. Ct. Tr. 185-187. He observed that an inquiry into the issues of competency and sanity may be largely irrelevant to factors which may be presented in mitigation. Id. He also testified that it would be necessary to obtain a social history of the client in order to render reasonably effective assistance at the sentencing phase of a capital trial. Id. at 185.

started by telling the jury that its sentence would be advisory and that "whatever you do will not be -- may not be followed by the Court." T. R. 545. He also stated,

> It is awfully hard to argue for a man's life. I have done it too many times, it never gets easy. . . . I feel as though I fell down on my job yesterday and I do not feel as though I can persuade you now . . . .
>
> . . . . I said I have done this too many times to find it easy. It's terribly difficult when a man is facing twelve citizens of your community who found him guilty of unlawful homicide, guilty of Murder in the First Degree and, in this case, the killing of a police officer.
>
> . . . . I feel as though my effectiveness is at a very low end. It is very hard.
>
> You heard all of the testimony, I'll say nothing further on behalf of my client other than just weigh and consider your decision.
>
> Thank you.

T. Tr. 546-547. (Counsel's entire closing remarks are set out as an Appendix E to this Petition.)

Following the jury recommendation of death, Mr. Stedeford was contacted by the writer of the presentence report, but provided no information and gave no assistance to him despite the fact that the presentence report writer was having difficulty obtaining information from Georgia and Ohio about Mr. Raulerson. D. Ct. Tr. 58-59. Such inaction was described by another attorney as "the worst possible response" to a request from the presentence report writer. Id. at 214.

Had Mr. Stedeford conducted even a superficial investigation in preparation for the sentencing phase of the trial, he would have been able to offer compelling evidence in mitigation. He could have presented Sheriff Dean Yeager of Carroll County, Ohio, who would have testified that Mr. Raulerson was a useful, productive, law-abiding citizen of that community for six years. The affidavit of Sheriff Yeager was admitted in the district court below. With minimal investigation, Mr. Stedeford could have presented the testimony of Phyllis Pilgram, Mr. Raulerson's cousin, who would have testified about a number of positive aspects of Mr. Raulerson's past, including the fact that when she

was having marital difficulties in 1974, Mr. Raulerson helped her and her husband work out their problems and, as a result, her marriage has survived until this day. Affidavit of Phyllis Pilgram, admitted in the district court below. He could have called Mr. Raulerson's grandfather, John S. Miller, who was present for the trial, but was never interviewed by Mr. Stedeford for purposes of testifying. Affidavit of John S. Miller, admitted in the district court below. Other family members were available as well. See Affidavit of Jo Ann Gunn, admitted in the district court below.

Had Mr. Stedeford even picked up his telephone, he could have presented five of the witnesses who testified at James David Raulerson's second sentencing hearing in 1980. (One witness who testified in 1980 did not know Mr. Raulerson until after his conviction.) He could have had Mr. Raulerson's wife, mother, sister, aunt, and mother-in-law describe to the jury that was to recommend sentence the story of this man's life: his difficult and troubled childhood; his exceptionally positive response to the care and love given him at age 16 by Dennis Raulerson, who adopted petitioner and treated him as his son; his excellent work record while in the restaurant business in Carrollton, Ohio, with Dennis Raulerson over a period of five years; the tragedy of seeing Dennis Raulerson shot and killed, and losing the one person who had provided the care and supervision he could not receive elsewhere; his struggle to keep the restaurant business alive after the death of Dennis Raulerson; his solid marriage and fatherhood of a young child; and his devotion to his family. However, because of counsel's failure to conduct any investigation with regard to mitigating evidence, the jury had none of this information when it made its advisory recommendation. Yet despite counsel's abdication of his professional responsibilities, four jurors voted to spare Mr. Raulerson's life. With even minimal investigation and advocacy, a reasonably competent attorney could have obtained a recommendation of a life sentence.

2. The Representation in 1980

Attorney David J. Busch's representation of Mr. Raulerson in 1980 at the second sentencing hearing was a completely unexpected consequence of the State's decision not to appeal the district court's decision in Raulerson v. Wainwright, 508 F. Supp. 381 (M.D. Fla. 1980). As established in the district court below, Mr. Busch was assigned strictly appellate responsibilities with the public defender office for an area covering 37 Florida counties. He had no prior capital trial experience, D. Ct. Tr. 128, 134, never anticipated representing Mr. Raulerson at a second hearing, and was unprepared for the hearing which was held on August 11 and 12, 1980, at which Mr. Raulerson was re-sentenced to death.

Following the denial of certiorari by this Court after Mr. Raulerson's conviction and sentence had been affirmed on direct appeal, Raulerson v. State, 358 So.2d 826, Mr. Busch filed on March 23, 1979, in the District Court for the Middle District of Florida a petition for a writ of habeas corpus asserting only one basis for relief, that Mr. Raulerson had been sentenced to death in 1975 in violation of the Supreme Court's decision in Gardner v. Florida, 430 U.S. 349 (1977).[18] No evidentiary hearing was requested by either party or held before the district court. D. Ct. Tr. 105.

On April 18, 1980, while the federal petition was still pending, the Governor of Florida signed a death warrant directing that Mr. Raulerson be executed on May 21, 1980. Because Mr. Raulerson was without other counsel at the time, Mr. Busch's office was appointed by the chief justice of the Florida Supreme Court to represent Mr. Raulerson on a motion for post conviction relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure. D. Ct. Tr. 106-108. Such a motion was filed by Mr.

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18. Mr. Busch testified that the filing of a federal petition for habeas corpus was not the usual practice for his office, but that he filed the petition because: "I felt as though there was a single federal issue that had been exhausted that was meritorious . . . ." D. Ct. Tr. 105. The memorandum in support of the petition was prepared by reworking the certiorari petition that had been denied. Id. at 107.

Busch on April 30, 1980.

On May 9, 1980, the federal district court vacated the death sentence based on the Gardner violation and remanded Mr. Raulerson's case to the state courts. On May 14, the state court held a hearing on the motion for post conviction relief filed by Mr. Busch and denied the motion. At that hearing, the Assistant Attorney General indicated that the State would petition the District Court for rehearing and appeal the federal order vacating Mr. Raulerson's sentence. Tr. of May 14, 1980 hearing at 7-9. In addition to the representations made at the hearing, Mr. Busch was told by the Assistant Attorney General that the State would appeal the district court's order. D. Ct. Tr. 112.

The State did in fact seek rehearing, supporting its motion with an affidavit, id. at 114, but the district court denied rehearing on June 24, 1980. 508 F. Supp. at 385-390. Thus, the time for noting an appeal did not expire until July 24, 1980. Fed. R. App. P. 4(a). During this time, Mr. Bush's work on behalf of Mr. Raulerson was directed toward defending the order vacating his client's conviction and preparing for appeal. He testified:

> They told me they were going to appeal. I had no reason to doubt. I had no reason to think that this was any kind of a charade or some kind of a tactic on their part; [I] took them at their word. They filed rehearing; they seemed to make every effort at overturning this Court's order, . . .

D. Ct. Tr. 112-113. Had it been anticipated that the case would be retried in the state circuit court, that responsibility would have been assigned to the local public defender office, not to the appellate public defender in Tallahassee. Id. at 113.

However, in an abrupt change of strategy, the State decided not to appeal the district court's order, but to return to state court for resentencing. This new strategy did not become apparent until a status hearing before the state court on July 15, 1980. Both Mr. Busch and the trial court indicated that it was their impression that the State would be appealing the district court order. Tr. of July 15, 1980 hearing at 3, 10. At the time of the status hearing, Mr. Busch had never anticipated that he

would ever handle the resentencing hearing and had made no efforts to prepare for such a hearing. D. Ct. Tr. 113, 116, 117. Although he told the state court that if he were going to handle the resentencing he needed additional time to prepare for it, Tr. of July 15, 1980 hearing at 4, 12, the second sentencing hearing commenced on August 11, 26 days after the July 15 hearing.

Mr. Busch did not meet with Mr. Raulerson after the July 15 hearing until the evening of August 10, the night before the resentencing. D. Ct. Tr. 117. In an affidavit admitted in the district court below, Mr. Busch stated that he did not recall ever "reviewing Lockett mitigation material" directly with his client. Busch Affidavit, Pet. Ex. 11, at 2. Mr. Busch testified in the court below that his relationship with Mr. Raulerson had deteriorated after the hearing on the motion for post conviction relief in the state court in May, 1980, due to some extent to the State's assertion that he had incompetently handled Mr. Raulerson's direct appeal. D. Ct. Tr. 109-111. Mr. Busch sought to withdraw as counsel at the hearing in May because his competency was questioned, he needed to testify as a witness, and was not sure whether he was defending himself or Mr. Raulerson. Tr. of May 14, 1980 hearing at 5-4, 54-57.[19] However, the motion to withdraw was denied. Id. at 63-64.

In the 26 days he had to prepare, Mr. Busch did not have any face-to-face interviews with any family members, associates or other people who could conceivably have been called in mitigation for Mr. Raulerson. D. Ct. Tr. 119-120.[20] Although he spoke with

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19. Mr. Busch testified that he also wished to withdraw because once the death sentence had been vacated, "I didn't see any reason . . . why our office in Tallahassee should now be put in the posture of having to investigate and research and otherwise develop a case in mitigation for Mr. Raulerson in Jacksonville. It didn't make any sense to me then. It really doesn't now. It was simply a case of kind of being dragged into that hearing. . . ." D. Ct. Tr. 110.

20. A second appellate public defender from Tallahassee, Louis Carres, was brought into the case on behalf of Mr. Raulerson between the July 15 status hearing and the sentencing hearing on August 11. However, Mr. Carres spent the week before the sentencing hearing in New York. D. Ct. Tr. 166. He flew directly

(footnote continued on next page)

one or two witnesses on the telephone, it was only about travel arrangements and not matters of substance. Id. at 125. He did not obtain Mr. Raulerson's school, employment, or hospital records, or talk to any supervisors or co-workers from Mr. Raulerson's past employment. Id. at 123.

On August 6, 1980, only five days before the second sentencing hearing, Mr. Busch filed a number of motions which made clear the lack of investigation and preparation for the sentencing hearing. On that date he moved the court for funds for an investigator, for notice of the aggravating circumstances upon which the state would rely, for an updated presentence report, for a continuance to allow time to prepare, and for an expert witness to examine Mr. Raulerson. R. App. II at 51-73. Thus, counsel failed to determine the nature and purpose of the second sentencing hearing, including such questions as whether it would be a de novo sentencing hearing or limited to rebuttal of the presentence investigation and whether it would be before a jury, until the morning of the hearing when the court ruled on his motions. August 11-12, 1980 hearing at 31-35, 64-67.

Counsel announced that they were not ready at the commencement of the second sentencing hearing and repeatedly advised the court throughout the hearing that they were unprepared and unable to represent Mr. Raulerson adequately. Tr. of August 11-12 hearing at 7-10, 20-24, 70-71. Counsel stated at the hearing that they began "intensive" preparation for the hearing the day before it began. Id. at 262. In fact, preparation did not actually begin until after 4 p.m. on the day before the hearing. D. Ct. Tr. 154. Counsel met the witnesses presented for the first time on the day of the hearing, Tr. of

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footnote continued from previous page:

from New York to Jacksonville on the day before the hearing and met Mr. Busch. Id. at 154. Both lawyers were engaged in making arrangements for the witnesses to be met at the airport until about 11 p.m. on the Sunday evening before the hearing, id. at 138, 154-155, but no witnesses were interviewed that evening. Id. at 139.

August 11-12 hearing at 9, learned of new witnesses when they interviewed the witnesses they met on the day of the hearing, id. at 46-47, and were unable to clarify or rebut portions of the presentence report and provide a social history of their client because of their lack of preparation. Id. 245-46. Counsel failed to secure or introduce at the hearing Mr. Raulerson's hospital records or evidence of his abuse by officers upon his arrest. Id. at 69-70. Counsel also indicated that there were at least four other witnesses whose presence they had not secured for the hearing. Id. at 72, 240-41, D. Ct. Tr. 122.

Although six witnesses were presented at the hearing, they were presented after only the most superficial interviews by counsel, conducted at the courthouse only moments before their testimony. Id. at 120-125. Mr. Busch testified that he was not prepared because neither predecessor counsel, Mr. Stedeford, nor he had conducted an investigation into matters which could be presented in mitigation. Id. at 120-121. As a result, he was unable to present effectively the evidence to the state court:

> [T]he difficulty was not knowing what they would say, not knowing what order to present them in, not knowing how to examine them, not being able to recall their names.

Id. at 124. He testified that he repeatedly conferred with co-counsel when the witnesses were testifying because:

> . . . I was asking him who this witness was. I mean I might not actually recollect what the relationship was between this witness and Mr. Raulerson; was this his mother, stepmother, aunt, a friend, wife or whatever. I just didn't have it down. I had met these people, half a dozen, for the first time an hour or so before the hearing and I didn't have their -- I had other things on my mind in addition to their testimony and just didn't have them straight in my mind.

Id. Mr. Busch testified that he did not talk to any people other than the six presented at the hearing with regard to testifying on behalf of Mr. Raulerson. Id. at 120. He did not present other witnesses only because he did not learn of them until the day of the hearing when he interviewed the witnesses he presented for the first time and because he did not conduct his investigation in time to arrange for their presence from out of state. Id. at 122-123. He testified

that there was no strategic or tactical decision for his failure to present other witnesses, id. at 123, and that he would have presented evidence of Mr. Raulerson's mistreatment as a child, his work record, his counseling of other family members about marital difficulties, and the testimony of law enforcement officers had he secured the presence of those witnesses at the hearing. Id. at 135-136.[21]

No closing argument was made on behalf of Mr. Raulerson at the sentencing hearing. Id. at 260-266. Counsel did not present Mr. Raulerson to make a statement to the sentencing court until after the court had made its findings of aggravating circumstances. Tr. of August 11-12 hearing at 280. Because the Court had already prepared its written order and made its findings sentencing Mr. Raulerson to death, the presentation of Mr. Raulerson's statements at that time was completely ineffective.

3. The Representation Did Not Meet Constitutional Standards as set out in Strickland v. Washington

The legal assistance provided to Mr. Raulerson in the state courts in 1975 and 1980 fell woefully below the standard set out in Strickland v. Washington. Mr. Stedeford failed to provide "even a modicum of professional assistance at any time." Young v. Zant, 677 F.2d 792, 795 (11th Cir. 1982). His failure to conduct a reasonable investigation into either the question of guilt or punishment made it impossible for him to exercise professional skill and judgment on behalf of Mr. Raulerson and to present "an intelligent and knowledgeable defense" on his behalf.

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21. The district court admitted the affidavits of five witnesses who could have been presented at the sentencing hearings in 1975 and 1980 had counsel conducted a reasonable investigation as required by the Sixth and Fourteenth Amendments. D. Ct. Tr. 220-221. These witnesses would have testified to matters in mitigation which were not presented at either hearing and were, therefore, not considered by the state court in sentencing Mr. Raulerson to death: the fact that Mr. Raulerson was brought up by elderly grandparents because he was abandoned by his mother, that he suffered deprivation because of the poverty of his grandparents during his childhood, that he was mistreated by his grandmother, and that he was well known to the sheriff of Carroll County, Ohio, Dean Yeager, as a hard-working, peaceful member of that community. See Affidavits of Phyllis Pilgrim, Jo Ann Gunn, John S. Miller, Joseph B. Ingle, and Sheriff Dean Yeager, admitted in the district court below.

Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970). Although he crammed ten depositions into one afternoon, he did not have the depositions transcribed, take notes on what the witnesses said, or otherwise memorialize their testimony for use at trial. He assumed, without finding out, that the remaining witnesses would not talk to him because of the controversial nature of the case, leaving him "in no better position than his jailed client to evaluate the legal and factual realities of the case . . . ." Gaines v. Hopper, 575 F.2d 1147, 1149 (5th Cir. 1978). As a result, he was not prepared to contest any aspect of the State's case or argue for lesser included offenses. Instead, he merely came to trial hoping that the State would forget to prove an essential element in a celebrated police murder trial.

Mr. Stedeford's closing argument at the guilt phase was completely preposterous and his pathetic closing remarks at the sentencing phase did not even contain a "naked plea for mercy," Young v. Zant, 677 F.2d at 798, but instead a confession of his ineffectiveness. (See Appendix E to this petition, counsel's entire closing argument.) In every regard, Mr. Stedeford's total indifference and incompetence fell below the constitutional standard, leaving Mr. Raulerson virtually without counsel at his trial and sentencing in 1975.

Mr. Busch, like his predecessor counsel, failed to conduct a reasonable investigation into mitigating circumstances and was, therefore, unable to render effective assistance at the second sentencing in 1980. Although Mr. Busch did call as witnesses the people who came to the sentencing in 1980, absolutely no professional skill and judgment were used in selecting witnesses, determining what they knew about Mr. Raulerson and preparing them to testify.

The court of appeals below concluded that even if Busch was unprepared, Mr. Raulerson suffered no prejudice from his failure to present evidence and to make a closing argument. 732 F.2d at 810. It based its conclusion on the fact that "the judge agreed to consider as final argument an exhaustive, eighty-seven page

memorandum previously filed on behalf of Mr. Raulerson." Id. However, the court of appeals completely overlooked the fact that the memorandum was prepared in connection with Mr. Raulerson's motion for post-conviction relief, which had been filed on May 5, 1980, four days before Mr. Raulerson was granted a new sentencing hearing by the federal court. The memorandum contains legal arguments relevant to the contentions made in the motion for post-conviction relief, all of which had been rejected by the state circuit court in May. The memorandum was completely irrelevant to the sentencing decision.

In Herring v. New York, 422 U.S. 853, 862 (1975), this Court observed that "the difference in any case between total denial of final argument and a concise persuasive summation could spell the difference, for the defendant, between liberty and unjust imprisonment." For James David Raulerson, it spelled the difference between life an death. Here, as in Herring, the total denial of any closing argument, albeit by counsel instead of by the court, violated the Sixth Amendment.

Nor is the fact that some witnesses were presented determinative of the ineffective assistance claim. The failure to present the other witnesses was not a strategic decision taken after reasonable investigation. Counsel admitted he was completely unprepared for the resentencing. Morecver, the witnesses who were not called could have been far more helpful to Mr. Raulerson than the ones who were presented. Among the other witnesses who were not presented was the sheriff who had known Mr. Raulerson for five years who, undoubtedly, "would have lent a new aura of credibility" to Mr. Raulerson's case, which was otherwise composed almost entirely of family members. Dickerson v. Alabama, 667 F.2d 1364, 1370 (11th Cir. 1982).

As observed by the court of appeals, had the trial court found even one mitigating circumstance, Mr. Raulerson would have been entitled to resentencing because of the trial court's reliance on an improper aggravating circumstance. 732 F.2d at 808 n. 5. Here, there is a reasonable probability that if Mr.

Raulerson's counsel had presented the available evidence and made a closing argument, the sentencer would have found mitigating circumstances and the result of the proceeding would have been different. Strickland v. Washington, 80 L.Ed.2d at 698.

James David Raulerson was denied a reliable adversary determination of both guilt and sentence. Such gross lack of preparation and advocacy renders meaningless the right to counsel guaranteed by the Sixth and Fourteenth Amendments. It has no place in any case in our judicial system, civil or criminal, but it is particularly intolerable in this capital case, where both the public and the defendant have a particular interest in reliability. Therefore, this Court should either review or vacate the decision of the Court of Appeals for the Eleventh Circuit.

CONCLUSION

For the reasons set forth herein, this Court should issue a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit. In the alternative, this Court should vacate the Court of Appeals decision and remand this case for further consideration in light of Strickland v. Washington.

Respectfully submitted,

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James David Raulerson

August 15, 1984

APPENDIX

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

JAMES DAVID RAULERSON,

Petitioner,

vs.

LOUIS L. WAINWRIGHT, Secretary Florida Department of Offender Rehabilitation, RICHARD DUGGER, Superintendent of Florida State Prison, and JIM SMITH, Attorney General, State of Florida

Respondents.

84-5247

ORIGINAL

PETITIONER'S APPENDICES TO PETITION FOR A WRIT OF CERTIORARI

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APPENDICES TO
PETITION FOR A WRIT OF CERTIORARI

A. The opinion of the Court of Appeals for the Eleventh Circuit in Raulerson v. Wainwright, 732 F.2d 803 (11th Cir. 1984)

B. Order of the Court of Appeals for the Eleventh Circuit denying Petition for Rehearing and Suggestion of Rehearing En Banc, filed June 11, 1984

C. The Florida Death Penalty Statute, Fla. Stats. Sec. 921.141

D. The opinion of the United States District Court of the Middle District of Florida in Raulerson v. Wainwright, filed September 7, 1984

E. The entire closing argument given by counsel for Mr. Raulerson, Walter Stedeford, at the sentencing phase before the advisory jury at Mr. Raulerson's trial in 1975

EDITOR'S NOTE

PAGES APP A THRU APP C WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Appendix A

self at trial; (3) petitioner was not denied effective assistance of counsel at any of the several stages of the proceedings; (4) trial court did not err in refusing to grant continuance of resentencing hearing to enable petitioner to gather favorable evidence; and (5) federal District Court did not err in refusing to grant additional time for evidentiary hearing on petitioner's allegations of ineffective assistance of counsel.

Affirmed.

Tuttle, Senior Circuit Judge, concurred in part, dissented in part, and filed opinion.

James David RAULERSON,
Petitioner-Appellant,

v.

Louie L. WAINWRIGHT, Secretary, Florida Department of Offender Rehabilitation, Richard Dugger, Superintendent of Florida State Prison at Starke, Florida, and Jim Smith, Attorney General of the State of Florida, Respondents-Appellees.

No. 83-3541.

United States Court of Appeals,
Eleventh Circuit.

May 1, 1984.

Petitioner, who was convicted in Florida state court of first-degree murder and sentenced to death, sought habeas corpus relief. From denial thereof by the United States District Court for the Middle District of Florida, John H. Moore, II, J., petitioner appealed. The Court of Appeals, Albert J. Henderson, Circuit Judge, held that: (1) state sentencing court did not fail to consider nonstatutory mitigating evidence proffered by petitioner; (2) petitioner was not denied his right to represent himself at trial; (3) petitioner was not denied effective assistance of counsel at any of the several stages of the proceedings; (4) trial court did not err in refusing to grant continuance of resentencing hearing to enable petitioner to gather favorable evidence; and (5) federal District Court did not err in refusing to grant additional time for evidentiary hearing on petitioner's allegations of ineffective assistance of counsel.

Affirmed.

Tuttle, Senior Circuit Judge, concurred in part, dissented in part, and filed opinion.

1. Criminal Law ⇐1208.1(6)

Totality of circumstances must be reviewed, including both statutory and nonstatutory mitigating factors, before death penalty may constitutionally be imposed. U.S.C.A. Const.Amends. 8, 14.

2. Criminal Law ⇐986.2(1)

Constitution prescribes only that sentencing court hear and consider all evidence defendant chooses to offer in mitigation; there is no requirement that the court agree with defendant's view that it is mitigating, but only that the proffer be given consideration. U.S.C.A. Const.Amends. 8, 14.

3. Criminal Law ⇐1208.1(6)

Sentencing court clearly gave consideration to evidence adduced by defendant at sentencing hearing with respect to defendant's troubled childhood, excellent work record, devotion to family, religious beliefs, and prospects for rehabilitation; there was no requirement that the court actually accept that evidence as establishing circumstances in mitigation of death penalty. U.S.C.A. Const.Amends. 8, 14.

4. Criminal Law ⇐641.4(2)

Since it is more likely than not that a defendant would fare better with assistance of counsel, he will be permitted to represent himself only when he knowingly and intelligently relinquishes his right to counsel. U.S.C.A. Const.Amend. 6.

5. Criminal Law ⇐641.4(2)

Knowing waiver of right to counsel must be made by clear and unequivocal assertion of right to self-representation. U.S.C.A. Const.Amend. 6.

6. Criminal Law ⇐641.7(1)

Once there is clear assertion of right to self-representation, court must conduct hearing to ensure that defendant is fully aware of dangers and disadvantages of proceeding without counsel. U.S.C.A. Const.Amend. 6.

7. Criminal Law ⇐641.4(4)

Defendant failed to make unequivocal assertion of his right to relinquish counsel and, thus, was not deprived of his constitutional right to appear pro se, having failed to pursue initial requests diligently and, at hearing at which request was eventually considered, having voluntarily absented himself from the courtroom and thus waived his right to appear pro se. U.S. C.A. Const.Amends. 6, 14.

8. Criminal Law ⇐641.10(3)

Defendant may waive his right of self-representation by electing to act as cocounsel. U.S.C.A. Const.Amend. 6.

9. Criminal Law ⇐641.13(1)

Even if defense counsel was ineffective, there must be showing of actual prejudice to conduct of defense before defendant is entitled to relief. U.S.C.A. Const. Amend. 6.

10. Criminal Law ⇐641.13(2)

Under totality-of-the-circumstances standard, defendant was not denied effective assistance of trial defense counsel, whose pursuit of the defense was perhaps not overly animated but was conducted as well as could be hoped, given nature of case involving first-degree murder charge and overwhelming evidence against defendant. U.S.C.A. Const.Amend. 6.

11. Criminal Law ⇐641.13(7)
Habeas Corpus ⇐25.1(6)

Although performance of petitioner's counsel at resentencing hearing may not have measured up to expectations of perfection, it was constitutionally adequate, taking into consideration the potentially mitigating evidence that was presented on petitioner's behalf; moreover, even if counsel's performance was constitutionally defective, petitioner failed to demonstrate that any of the alleged errors caused him the actual and substantial disadvantage required to obtain habeas corpus relief. U.S. C.A. Const.Amend. 6.

12. Criminal Law ⇐586

Decision whether to grant continuance is matter left up to discretion of the trial judge.

13. Criminal Law ⇐594(1)

While the constitutional right to compulsory process under the Sixth Amendment is well established, not every denial of continuance infringes that right. U.S. C.A. Const.Amend. 6.

14. Criminal Law ⇐662(1)

Denial of continuance of resentencing hearing did not violate defendant's Sixth Amendment right of confrontation, given that counsel was diligent in attempting to find witnesses who would have testified favorably, testimony of witnesses who were not called would have been repetitive, and testimony of witnesses who did testify was not shown to have been likely to be enhanced had counsel had more time to interview them. U.S.C.A. Const.Amend. 6.

15. Habeas Corpus ⇐90

District court is required to grant evidentiary hearing in habeas proceedings where facts were not sufficiently developed in the state court.

16. Habeas Corpus ⇐70

Courts of Appeals, as well as district courts, are bound to stay pending execution if there is not sufficient time to consider properly the merits of issues raised in habeas corpus petition.

17. Habeas Corpus ⇐59

In habeas corpus actions, petitioner bears burden of demonstrating facts sufficient to warrant evidentiary hearing or additional time for a hearing.

18. Habeas Corpus ⇐59

Petitioner failed to produce evidence of sufficient merit that would have warranted grant of additional time for evidentiary hearing in district court habeas corpus proceedings, absent anything more than general assertions that various allegations relating to ineffective assistance of counsel could be further supported if additional time were allotted. U.S.C.A. Const.Amend. 6.

Stephen B. Bright, Atlanta, Ga., for petitioner-appellant.

David P. Gauldin, Asst. Atty. Gen., Tallahassee, Fla., for respondents-appellees.

Appeal from the United States District Court for the Middle District of Florida.

Before FAY and HENDERSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

ALBERT J. HENDERSON, Circuit Judge:

This is an appeal from the denial of the petition of the appellant, James Davis Raulerson, for a writ of habeas corpus in the United States District Court for the Middle District of Florida. On April 27, 1975, Raulerson and his accomplice, Jerry Leon Tant, robbed the Sailmaker Restaurant in Jacksonville, Florida. During the course of the robbery, Raulerson forced a female employee into a back room and raped her. In the meantime, two police officers, James English and Michael Stewart, were dispatched to the scene. Upon their arrival, a gun battle ensued during which Tant and Officer Stewart were killed. The evidence disclosed that the bullets that killed Officer Stewart came from Raulerson's gun.

In August of 1975 Raulerson was convicted of first degree murder and sentenced to death. The conviction and sentence were affirmed on appeal. *See Raulerson v. State*, 358 So.2d 826 (Fla.), *cert. denied*, 439 U.S. 959, 99 S.Ct. 364, 58 L.Ed.2d 352 (1978). Subsequently, he filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Florida. That court found that Raulerson had been denied the opportunity to rebut the contents of his presentence report in violation of *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), and ordered a new sentencing hearing. *See Raulerson v. Wainwright*, 508 F.Supp. 381, 383–85 (M.D.Fla.1980).[1] Raulerson was again sentenced to death. The Florida Supreme Court consolidated the appeals from the denial of post conviction relief and reimposition of the death penalty and affirmed both judgments. *See Raulerson v. State*, 420 So.2d 567 (Fla.1982), *cert. denied*, — U.S. —, 103 S.Ct. 3572, 77 L.Ed.2d 1412 (1983).

The state set Raulerson's execution for September 7, 1983. On August 22, 1983, he filed a second petition for post conviction relief in the Circuit Court of Duval County under Rule 3.850 of the Florida Rules of Criminal Procedure. The circuit court denied both the petition and a motion for a stay of execution. The Florida Supreme Court again affirmed. *See Raulerson v. State*, 437 So.2d 1105 (Fla.1983).

On September 2, 1983, Raulerson filed this habeas corpus petition in the United States District Court for the Middle District of Florida. The court held an evidentiary hearing on September 6, 1983, and granted a temporary stay of execution. Ultimately, the district court denied the writ and lifted the stay but granted a certificate of probable cause to appeal.

[1] In this appeal, Raulerson urges five grounds of error: (1) the state trial court's failure to consider nonstatutory mitigating evidence; (2) the denial of his right to represent himself at trial; (3) the denial of effective assistance of counsel during several stages of the proceedings; (4) the trial court's refusal to grant a continuance to

1. While awaiting the decision of the district court, Raulerson filed a motion to vacate judgment and sentence in the Circuit Court of Duval County, Florida pursuant to Florida Rule of Criminal Procedure 3.850. The court denied his motion.

enable him to gather favorable evidence for his sentencing hearing; and (5) the district court's expeditious resolution of his habeas corpus petition. After careful examination of these assignments of error, we find them to be without merit. Accordingly, we affirm the denial of Raulerson's petition for a writ of habeas corpus.

I. Nonstatutory Mitigating Evidence

During the second sentencing hearing, Raulerson called a host of witnesses who testified to his troubled childhood, excellent work record, devotion to family, religious beliefs and prospects for rehabilitation. In pronouncing sentence, the court stated that it found five aggravating circumstances but no mitigating ones, statutory or otherwise. It is this statement that gave rise to Raulerson's first contention that the trial court failed to consider his evidence of mitigating circumstances. Contrary to Raulerson's assertion, it is evident from the record before us that the trial judge did consider the evidence but concluded that it did not outweigh the factors militating in favor of the death penalty. The real thrust of his argument seems to be that the court committed error of constitutional magnitude by not accepting the evidence as mitigating.

It is clear from recent decisions of the Supreme Court that a prerequisite to constitutional imposition of the death penalty is consideration by the sentencer of the individual circumstances of the crime, that is, "the character and record of the individual offender and the circumstances of the particular offense...." *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944, 961 (1976). *See also Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976). This obviously means that the totality of circumstances must be reviewed including both statutory and nonstatutory mitigating factors. *See Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

[2] In *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) the Supreme Court struck down a North Carolina statute that required imposition of the death penalty for first degree murder. The Court reasoned that such mandatory sentencing statutes obviate the necessity for the sentencer to exercise discretion in contravention of the principle that "justice ... requires consideration of ... the circumstances of the offense together with the character and propensities of the offender." *Id.* at 304, 96 S.Ct. at 2991, 49 L.Ed.2d at 961 (quoting *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55, 58 S.Ct. 59, 61, 82 L.Ed. 43, 46 (1937)).

This requirement of giving full consideration to mitigating factors in addition to the nature and circumstances of the crime was given increased vitality in *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). In *Lockett*, the Supreme Court struck down the Ohio death penalty statute because it failed to allow consideration of such factors as age and familial history in mitigation. Under the Ohio statute, personal background evidence was admissible only if it substantiated the existence of any of the state's three statutorily enumerated mitigating circumstances.[2] The Supreme Court invalidated the statute as violative of the eighth and fourteenth amendments, holding that the sentencer must "not be precluded from con-

3. At the time of *Lockett*'s trial, imposition of the death penalty for aggravated murder was mandatory unless, upon consideration of "the nature and circumstances of the offense and the history, character and condition of the offender," the sentencer could find one of the following mitigating circumstances applicable:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

Ohio Rev.Code Ann. § 2929.04(B) (1975).

sidering ... any aspect of a defendant's character or record" proffered in mitigation of his offense. *Id.* at 604, 98 S.Ct. at 2964–65, 57 L.Ed.2d at 990. Thus, *Lockett* instructs that the sentencing body be free to *consider* the impact of the defendant's background in making its decision. To say, however, as Raulerson maintains, that *Lockett* imposes a duty on the sentencer to regard such evidence as mitigating is quite another matter. That such an interpretation would be an overbroad reading of *Lockett* is apparent from the Supreme Court's subsequent decision in *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

In *Eddings*, the Supreme Court overturned a death penalty because the trial court refused to consider Eddings' troubled past in mitigation of his sentence. In reaching its decision, the Court concluded that it was "clear that the trial judge did not evaluate the evidence in mitigation and find it wanting as a matter of fact, rather he found that *as a matter of law* he was unable even to consider the evidence." *Id.* at 113, 102 S.Ct. at 875, 71 L.Ed.2d at 10 (emphasis original). The trial judge's self-imposed restrictions on the scope of the evidence that he would consider in mitigation violated both state statutory law and federal judicial precedent. As the Court stated, "the Oklahoma death penalty statute permits the defendant to *present* evidence 'as to any mitigating circumstances.' *Lockett* requires the sentencer to *listen*."

3. Our conclusion on this point is reinforced by this circuit's recent decision in *Dobbert v. Strickland*, 718 F.2d 1518 (11th Cir.1983). There the court faced a similar challenge that the district court had failed both to consider non-statutory evidence and to find it mitigating. In rejecting this argument, the court stated:

> The fact that the sentencing order does not refer to the specific types of non-statutory "mitigating" evidence petitioner introduced indicates only the trial court's finding the evidence was not mitigating, not that such evidence was not considered. Whether particular evidence, such as the fact that Dobbert had a difficult childhood, is mitigating depends on the evidence in the case as a whole and the views of the sentencing and reviewing judges. What one person may view as mitigating, another may not. Merely because the Florida courts, operating through a properly drawn statute with appropriate standards to guide discretion, do not share petitioner's view of the evidence reveals no constitutional infirmity.

Id. at 1524. Therefore, as long as the proffered evidence is considered fairly, the Supreme Court's mandate in *Eddings* generally is satisfied. *But see infra* note 4.

4. In *Eddings*, the Supreme Court intimated that where the murder was committed by a child or adolescent, a turbulent familial history might be deemed to be a mitigating circumstance as a matter of law. The *Eddings* Court's implication is not relevant here, since Eddings was only 16 years old while Raulerson was 23 at the time of the crime.

Id. at 115, n. 10, 102 S.Ct. at 876 n. 10, 71 L.Ed.2d at 11 n. 10 (emphasis added) (citation omitted).

A careful examination of *Eddings* reveals that the Constitution prescribes only that the sentencer hear and consider all the evidence a defendant chooses to offer in mitigation. There is no requirement that the court agree with the defendant's view that it is mitigating, only that the proffer be given consideration.[3]

The reliance on mitigating evidence is a matter for the sentencing authority. Although the Supreme Court has indicated that in certain circumstances, background evidence not only must be considered but must be accorded significant weight,[4] the general rule is that as long as the evidence is evaluated, it properly may be given little weight or no weight at all. *See Eddings v. Oklahoma*, 455 U.S. at 114–15, 102 S.Ct. at 875–76, 71 L.Ed.2d at 11.

[3] In this case, the trial court explicitly demonstrated that it had met its constitutional burden. It heard extensive evidence in mitigation and then made an explicit finding: "The Court has examined and considered the evidence to determine whether there are circumstances, other than those specified [in the Florida statute], which would mitigate the murder committed by the Defendant herein. The Court finds that there are no such non-statutory mitigating circumstances within the meaning

of Lockett v. Ohio...."[5] There can be no clearer evidence that the trial court followed *Lockett's* dictates.

In summary, *Lockett* stands for the proposition that the sentencer must *consider* all mitigating evidence.[6] After so doing, it then is generally free to accord that evidence such weight in mitigation that it deems fit.

II. The Right of Self-Representation

[4-6] The sixth and fourteenth amendments guarantee state criminal defendants the right of self-representation at trial. *See Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). Since it is more likely than not that a defendant would fare better with the assistance of counsel, *id.* at 835, 95 S.Ct. at 2540, 45 L.Ed.2d at 581, he will be permitted to represent himself only when he "knowingly and intelligently" relinquishes his right to counsel. *Id.* at 835, 95 S.Ct. at 2540, 45 L.Ed.2d at 581. Such a knowing waiver must be made by a "clear and unequivocal" assertion of the right to self-representation. *See Faretta*, 422 U.S. at 835, 95 S.Ct. at 2541, 45 L.Ed.2d at 582. Once there is a clear assertion of that right, the court must conduct a hearing to ensure that the defendant is fully aware of the dangers and disadvantages of proceeding without counsel. *See Hance v. Zant*, 696 F.2d 940, 949 (11th Cir.), *cert. denied*, — U.S. —, 103 S.Ct. 3544, 77 L.Ed.2d 1393 (1983).

[7] In the present case, Raulerson requested that he be permitted to act as co-counsel with his attorney, David Busch, during a status hearing prior to the second sentencing hearing on July 15, 1980. The court denied the request. Subsequently, on July 18, 1980, Raulerson sent a letter to the judge requesting permission to appear pro se. The court did not immediately act on this second request. At the resentencing hearing on August 11-12, 1980, however, the court reversed its original position and granted Raulerson permission to act as co-counsel, relying on the Florida appeals court's decision in *Tait v. State*, 362 So.2d 292 (Fla.Dist.Ct.App.1978). During the course of the hearing, the Florida Supreme Court overruled *Tait*, thereby striking down such "hybrid" representation. *See State v. Tait*, 387 So.2d 338 (Fla.1980). The trial court then withdrew its earlier grant of permission to act as co-counsel.

After his removal as co-counsel, Raulerson did not immediately renew his request to appear pro se. Later, however, at a hearing on February 6, 1981, he made a request in open court to represent himself. At that point, the judge began a *"Faretta"* inquiry into Raulerson's understanding of the potential danger inherent in his action, but subsequently terminated the hearing when Raulerson abruptly walked out of the courtroom.

In light of these facts, we conclude that Raulerson failed to make an "unequivocal" assertion of his right to relinquish counsel until February 6, 1981. On that date, he did make known his desire to appear pro se but then waived it by voluntarily leaving the courtroom during the *Faretta* inquiry. Initially, Raulerson wrote a letter to the judge requesting to appear pro se but did not pursue the matter. Although a defendant need not "continually renew his request to represent himself even after it is conclusively denied by the trial judge," *Brown v. Wainwright*, 665 F.2d 607, 612 (5th Cir. 1982), he must pursue the matter diligently.

The court took no immediate action upon receipt of Raulerson's letter. Thus, it did not conclusively deny the request at that time. When Raulerson subsequently requested and was granted the right to serve as co-counsel, he acquiesced without objection. Later, when this right was taken away, he failed, at that time, to notify the court of his desire to represent himself.

[8] A defendant may waive his right of self-representation by electing to act as co-counsel. *See Brown v. Wainwright*, 665 F.2d 607, 611 (5th Cir.1982); *Chapman v. United States*, 553 F.2d 886, 893 n. 12 (5th Cir.1977). Even if Raulerson's letter of July 18, 1980 constituted a clear and unequivocal demand to represent himself, his agreement to proceed with the assistance of an attorney waived that original request until he reasserted it on February 6, 1981. At that time he made a valid assertion of his right and the court responded by initiating its required *Faretta* hearing. At this time he again waived his right to appear pro se when he voluntarily absented himself from the courtroom. His behavior on this occasion convinces us that he was not deprived of his constitutional right to appear pro se.

III. Ineffective Assistance of Counsel

[9] Raulerson claims that his counsel did not render effective assistance during his trial and both sentencing hearings. In reviewing this assignment of error, we do not reach the question of his attorney's effectiveness or ineffectiveness during the first sentencing hearing because the sentence resulting from that hearing is not under attack. The trial judge at the second sentencing hearing did not rely on the original jury's recommendation of death in making his assessment of the appropriate penalty at the second hearing.

The sixth amendment guarantees criminal defendants the assistance of counsel. A corollary has been added to this amendment by interpreting it to require *"effective* assistance of counsel, that is, counsel reasonably likely to render and rendering reasonably effective assistance given the totality of the circumstances." *Washington v. Strickland*, 693 F.2d 1243, 1250 (5th Cir. Unit B 1982) (emphasis original), *cert. granted*, — U.S. —, 103 S.Ct. 2451, 77 L.Ed.2d 1322 (1983). Even if counsel was ineffective, the petitioner must show actual prejudice to the conduct of his defense before he would be entitled to relief. *Id.* at 1258.

[10] Raulerson originally was represented by Walter Stedeford, a trial attorney with approximately twelve years of experience including a substantial amount of criminal work. Raulerson criticizes numerous aspects of Stedeford's performance, including a failure to make an extensive pretrial investigation, failure to interview all the state's witnesses, failure to file for a change of venue because of prejudicial publicity and a generally perfunctory trial demeanor culminating in a weak and ineffectual closing argument. These allegations do not accurately reflect the true nature of Stedeford's representation.

In reality, Stedeford had no need to research and prepare extensively prior to trial since he recently had finished another trial with similar issues. Although Stedeford may have interviewed only ten of the one hundred witnesses on the prosecution's list, those ten comprised two-thirds of the State's fifteen witnesses who testified at the trial. Moreover, several of those fifteen were merely chain-of-custody witnesses. Although he filed no motion, Stedeford did explore the possibility of seeking a change in venue, but after the voir dire examination, he determined that such action would be fruitless. In summary, Stedeford's representation appears more than adequate.

5. The presence of mitigating circumstances is important in this case. On direct appeal, the Florida Supreme Court concluded that one of the five aggravating circumstances—that the murder was heinous, atrocious and cruel, Fla. Stat.Ann. § 921.141(5)(h)—was applied erroneously. *Raulerson v. State*, 420 So.2d 567, 571 (Fla.1982). Under Florida law, where an improper aggravating circumstance is considered and there are mitigating circumstances, the cause must be remanded for resentencing. *See Sireci v. State*, 399 So.2d 964 (Fla.1981); *Elledge v. State*, 346 So.2d 998 (Fla.1977). Therefore, had the trial court found any mitigating circumstances, Raulerson would have been entitled to a new sentencing hearing.

6. Although *Lockett* and its progeny emphasize that the court must consider virtually any mitigating evidence that the defendant proffers, we note that the court does retain some discretion over the process. The Court specifically stated that "[n]othing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." *Lockett v. Ohio*, 438 U.S. at 604 n. 12, 98 S.Ct. at 2965 n. 12, 57 L.Ed.2d at 990 n. 12. *See, e.g., Skipper v. Wainwright*, 715 F.2d 1452 (11th Cir.1983) (evidence concerning the general propriety of electrocution as a method of execution held properly excludable as irrelevant).

It is important to note that *Washington v. Strickland* mandates that the effectiveness of counsel be judged in light of "the totality of the circumstances." 696 F.2d at 1250. In this case, there was little doubt as to culpability as there were eye witnesses to the crime. Additionally, Raulerson was shot by a bullet from one of the policemen's guns, and he surrendered to the police at the scene of the crime. In these circumstances, Stedeford was relegated to putting the state to its proof and trying to catch the prosecution in error. Although Stedeford's pursuit of Raulerson's defense perhaps was not overly animated, it was probably as well conducted as one might hope, given the nature of Raulerson's case and the overwhelming evidence against him.

[11] At the resentencing phase, Raulerson was represented by David Busch, the state public defender who had represented him for the five years preceding the hearing. Raulerson complains that Busch lacked sufficient time for preparation, he was not familiar with the witnesses and he failed to make a closing argument. After reviewing each of these claims, we find no error.

Busch testified to the district court that he had been wholly unprepared to represent Raulerson at his second sentencing because of the expediency of the resentencing hearing. He had expected the State to appeal its adverse decision in the district court and was surprised when it simply acquiesced in the resentencing order. Nevertheless, the record is clear that at the very latest, Busch knew by July 15, 1980 that he would be representing Raulerson at his resentencing on August 11, 1980. This gave him twenty-six days in which to prepare. This time span should have been sufficient in light of Busch's representation of Raulerson for the past five years.

Although supposedly unprepared for the hearing, Busch called six witnesses who testified on Raulerson's behalf. Busch claimed that, given more time, he could have produced additional witnesses and become more familiar with the ones who did testify. There was no showing, however, that any additional testimony would have been anything but cumulative in nature or that other favorable testimony could have been adduced from the witnesses who were present. Thus, even if Busch was unprepared as he testified, no prejudicial effect to Raulerson resulted therefrom.

Similarly, Raulerson suffered no prejudice from Busch's failure to make a closing argument. At the close of the evidence at the second hearing, Busch said that he was too exhausted to present a final argument. He moved for, but was denied a continuance until the following day. However, because the new sentencing hearing was held by the court and not before a jury, the judge agreed to consider as final argument an exhaustive, eighty-seven page memorandum previously filed by Busch. The failure to make an oral closing argument under these circumstances does not rise to the level of ineffective assistance of counsel.

In summary, although Busch's performance may not have measured up to his expectations of perfection, it was constitutionally adequate, taking into consideration the potentially mitigating evidence that he did present on Raulerson's behalf. Moreover, even if Busch's performance had been constitutionally defective, Raulerson has failed to demonstrate that any of the alleged errors caused him the "actual and substantial disadvantage" required to obtain habeas corpus relief. *Washington v. Strickland*, 693 F.2d at 1258. *Cf. King v. Strickland*, 714 F.2d 1481 (11th Cir.1983) (lack of preparation manifested by almost total failure to present mitigating evidence and borderline adverse closing argument held ineffective assistance). Therefore, Raulerson was not denied effective assistance of counsel at any relevant phase of the judicial process.

IV. Failure to Grant Continuance

Having first challenged his second sentencing hearing on the basis of ineffective counsel, Raulerson now alleges that the proceeding was replete with judicial error as well. He contends that the state court erred in not granting continuances so that

Busch could bring in new witnesses, conduct further interviews with those who were present and prepare a closing argument.

[12, 13] The decision whether to grant a continuance is a matter left up to the discretion of the trial judge. *See United States v. Russell*, 717 F.2d 516 (11th Cir. 1983). While the constitutional right to compulsory process under the sixth amendment is well established, not every denial of a continuance infringes this right. *See Dickerson v. Alabama*, 667 F.2d 1364 (11th Cir.), *cert. denied*, — U.S. —, 103 S.Ct. 173, 74 L.Ed.2d 142 (1982). To warrant habeas corpus relief, the petitioner must show not only that the district court abused its discretion but that the abuse was "so arbitrary and fundamentally unfair that it violates constitutional principles of due process." *Hicks v. Wainwright*, 633 F.2d 1146, 1148 (5th Cir. Unit B 1981).[7] There is little doubt that no abuse of discretion, let alone such that would offend constitutional principles, occurred in this case.

[14] In ascertaining the propriety of the denial of a continuance, consideration must be given to factors such as diligence in obtaining witnesses, the length of time needed for their procurement, the favorable tenor of their testimony and the "unique or cumulative nature of the testimony." *Id.* at 1149, quoting *United States v. Upton*, 531 F.2d 1281, 1287 (5th Cir. 1976). The record is clear that counsel was diligent in attempting to find witnesses who would have testified favorably. Consequently, only the last factor concerns us in this case.

As we concluded earlier in dealing with the effectiveness of Busch's representation at the second sentencing hearing, there is no support in the record for the assertion that other witnesses would have been available to give additional favorable mitigating evidence if only the sentencing court had granted a continuance. *Cf. Dickerson v. Alabama*, 667 F.2d 1364 (11th Cir.) (error to refuse continuance when necessary to procure credible alibi witness), *cert. denied*, — U.S. —, 103 S.Ct. 173, 74 L.Ed.2d 142 (1982); *Hicks v. Wainwright*, 633 F.2d 1146 (5th Cir. Unit B 1981) (denial of continuance when needed to procure sole witness in support of only line of defense held error); *Gandy v. Alabama*, 569 F.2d 1318 (5th Cir.1978) (where lead counsel absented himself from trial and associate counsel was wholly unprepared to conduct defense, failure to grant continuance was error). Here, there is no evidence of the existence of such witnesses, except those whose testimony would have been repetitive. Also, Raulerson has not shown that the testimony of the witnesses who did testify would have been enhanced had only Busch had more time to interview them. Finally, there was no error of constitutional magnitude in the refusal to postpone the final arguments until the following day in light of the court's promise to consider the written memorandum for that purpose. Therefore, Raulerson has failed to show that the state trial court abused its discretion by refusing to grant a continuance.

V. Failure to Permit Sufficient Time to Prepare for District Court Hearing

On August 5, 1982, the Governor of Florida signed Raulerson's death warrant, directing that his sentence be carried out during the week of September 2, 1982. The state chose September 7, 1982 as the execution date. Raulerson's current counsel undertook his representation on August 22, 1982 by filing a motion for post conviction relief in the state court. Fla.R.Crim.P. 3.850. The motion was denied and the Florida Supreme Court affirmed the decision on September 1, 1982. Having exhausted his state remedies, Raulerson then filed this petition in the district court on Friday, September 2, 1982. Because of the holiday weekend,[8] the court set the case for an evidentiary hearing on Tuesday, Sep-

7. In *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33, 34 (11th Cir.1982), the Eleventh Circuit Court of Appeals adopted as precedents all decisions of Unit B of the former Fifth Circuit.

8. Monday, September 5, 1982 was Labor Day. Therefore, the district court scheduled Raulerson's evidentiary hearing for the first business day after receipt of the petition.

tember 6, 1983. After the hearing, the court granted a forty-eight hour stay of execution, thereby extending the date to Friday, September 9, 1983.

On September 8, 1983 the district court entered its order denying the writ, an application for a stay of execution and additional briefing time. The court did grant a certificate of probable cause to appeal. In order to evaluate fully the merits of Raulerson's claims, this court granted a requested stay of execution.

Raulerson does not complain of the lack of an evidentiary hearing in the district court but rather he claims that his counsel had insufficient time for the background research necessary to adequately develop the facts at the hearing.

[15, 16] The district court is required to grant an evidentiary hearing where the facts were not sufficiently developed in the state court. *See Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). The courts of appeal are bound to stay a pending execution if there is not sufficient time to "consider properly the merits of the issues raised" in the habeas corpus petition. *Dobbert v. Strickland*, 670 F.2d 930 (11th Cir.1982).

The *Dobbert* mandate applies equally to the district courts. In this case, however, there is no indication that the court did not allow enough time for adequate development of the merits of the case. In his petition to the district court, Raulerson's counsel made only the boldfaced assertion that they would be able to support their allegations further if they were allotted additional time.[9] They made no proffer as to what they might have been able to prove had they had more time to prepare.[10]

9. Raulerson's petition for habeas corpus relief reads in pertinent part as follows:

> The affidavits are submitted to show the prima facie merit to petitioner's claim of ineffective assistance of counsel. Petitioner anticipates offering additional evidence in support of his claims once present counsel has had an opportunity to further investigate the case. The affidavits submitted provide only a sketch of what the witnesses could state if presented as witnesses.

Record at 31, n. 1.

At the evidentiary hearing, counsel argued for additional discovery time:

> Our brief is preliminary in nature, and I believe that the evidence we offered here today is only preliminary in nature. . . . I would . . . move this Court to grant a stay of execution and additional time as requested in the petition for a Writ of Habeas Corpus . . . for the opportunity to develop and present further evidence before this Court, before any final order is entered. . . .

Transcript at 270.

10. In the district court, Raulerson's counsel made unsupported allegations regarding his ability to substantiate the claims of ineffective assistance of counsel if there were more time. To date, his attorneys have submitted only the affidavits of five people who would have testified for Raulerson at his resentencing had there been sufficient time and money. *See* record at 106–22.

Six people actually testified at the hearing. Raulerson's habeas corpus petition sums up their testimony as follows:

> (a) that petitioner had a difficult upbringing in that he was abandoned by his father, was placed in a home by his mother and later adopted by his grandparents;
>
> (b) that petitioner had an excellent work record over a six-year period in Carrollton, Ohio, where he worked in a restaurant;
>
> (c) that petitioner suffered a traumatic incident in his life when the man who took him in and became a father figure to him was shot in a domestic quarrel at the restaurant he ran with petitioner and died in petitioner's arms;
>
> (d) that petitioner struggled for a year to keep the restaurant in business after the murder of his stepfather, but it was closed because of back taxes owed;
>
> (e) that petitioner had an interest in his family and had gone to considerable efforts to locate his brothers and sisters who had been adopted by other families;
>
> (f) that petitioner had a wife and a small child;
>
> (g) that petitioner had an interest in religion;
>
> (h) that petitioner was a good prospect for rehabilitation.

Record at 16–17.

> After a careful study of the petition and supporting affidavits introduced in the district court, and all the evidence before this court, we are convinced that any additional time would have been of little or no benefit. The affidavits of the purportedly crucial witnesses who were prevented from testifying by time constraints disclose no novel evidence but present only repetitive and cumulative testimony. *See* affidavits of David J. Busch, Phyllis Pilgrim, Joann Gunn, John S. Miller, Joseph B. Ingle, and Dean Yonger, record at 93–120.

This court has previously pointed out that a petitioner's "suggestion that he could produce

Moreover, they still are unable to proffer any convincing evidence to this court to indicate that the hearing in the district court was deficient.

[17, 18] In habeas corpus actions, the petitioner bears the burden of demonstrating facts sufficient to warrant an evidentiary hearing, *see Jones v. Estelle*, 622 F.2d 490, 492 (5th Cir.1980), *cert. denied*, 451 U.S. 916, 101 S.Ct. 1992, 68 L.Ed.2d 307 (1981), or, as here, additional time for a hearing. "[T]his court will not 'blindly accept speculative and inconcrete claims' as the basis upon which a hearing will be ordered," or additional time be granted. *Dickson v. Wainwright*, 683 F.2d 348, 351 (11th Cir.1982) (*quoting Baldwin v. Blackburn*, 653 F.2d 942, 947 (5th Cir. Unit A 1981), *cert. denied*, 456 U.S. 930, 102 S.Ct. 2021, 72 L.Ed.2d 475 (1982). Raulerson failed to produce evidence of sufficient merit that would warrant the grant of additional time.

The judgment of the district court denying the writ of habeas corpus is AFFIRMED.

TUTTLE, Senior Circuit Judge, concurring in part and dissenting in part:

With deference, I concur in part and dissent in part. I concur in the opinion of the majority with respect to all issues other than that dealing with Raulerson's request to represent himself at the resentencing hearing. As to that issue I dissent. My disagreement with the Court is with the conclusion "that Raulerson failed to make an 'unequivocal' assertion of his right to relinquish counsel until February 6, 1981", and with the Court's treatment of his failure to reassert his demand to represent himself.

> evidence at a subsequent hearing does not satisfy his burden" in stating a valid constitutional claim. *Stephens v. Kemp*, 721 F.2d 1309, 1303 n. 1 (11th Cir.1983). We reiterate that "wholly unsupported attacks on the competency and effectiveness of prior counsel will not be tolerated." *Id.* at 1304 n. 2. Raulerson's habeas corpus petition makes only unsubstantiated attacks on the competency of his prior counsel. No claim exposed that would have justified the issuance of an indefinite stay or the grant of additional discovery time.

At a status hearing on July 15, 1980, Raulerson requested to appear as co-counsel in his case. This motion was denied by the trial court.[1] Thereafter, Raulerson sent a letter, dated July 18, 1980 to the trial judge. In that letter, Raulerson expressed dissatisfaction with his attorney and formally moved to appear pro se, even going so far as to cite *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). Thereupon, under the Supreme Court's holding in *Faretta*, and as pointed out by this Court in *Hance v. Zant*, 696 F.2d 940, 949 (11th Cir., 1983), the trial court was obliged to conduct a *Faretta*-type hearing in order to make plain to Raulerson the dangers and possible adverse results if he acted as counsel for himself. Instead, however, of doing that he permitted Raulerson to act as co-counsel, relying on a Florida appeals court's decision in *Tait v. State*, 362 So.2d 292 (Fla.D.C.A.1978). Immediately thereafter, the trial judge learned that the Florida Supreme Court had overruled the district court of appeals in the *Tait* case. *State v. Tait*, 387 So.2d 338 (Fla.1980). The trial court then withdrew its earlier grant of permission for Raulerson to act as co-counsel and proceeded to a judgment sentencing him to death. At a subsequent hearing on February 6, 1981 dealing with an appeal from this sentence, Raulerson again demanded the right to represent himself, whereupon the trial judge commenced his *Faretta*-type hearing. The trial judge conducted such a hearing until Raulerson left the courtroom. This hearing, as noted, was entirely collateral to the present case, because the trial judge had already sentenced Raulerson to the death penalty on August 12.

1. A defendant does not have a constitutional right to hybrid representation (self-representation with the assistance of counsel), although such representation remains as an option in the discretion of the trial court. *Leonard Jones v. Mullen*, 640 F.2d 1080, 1089 (9th Cir.1981); *United States v. Daniels*, 572 F.2d 535, 540 (5th Cir.1978).

Instead of conducting the *Faretta*-type hearing the record discloses the following scenario: first Raulerson asked for the right to appear as co-counsel, possibly thinking that this was the maximum he could expect from the trial judge; he then made a formal demand for the right to represent himself pro se, which should have resulted in an immediate hearing by the trial court; then, he was favored by the action of the trial court in permitting him to act as co-counsel, but then within a few hours he faced a reversal of the judge's position and was denied that right; then, some six months later in an unrelated hearing he made a further motion to represent himself. Thereupon, the trial court proceeded to hold the *Faretta*-type inquiry. It is not, it seems to me, reasonable for us to assume that when Raulerson at this late date, after the conclusion of the resentencing proceeding on August 11 and 12 in defiance of his established right, then asked to represent himself, this would be his first "unequivocal" assertion of his right. If we were to make any assumption, I think it would be that by this time Raulerson would be so utterly confused that he might be expected to walk out on that proceeding.

Unless we can assume that Raulerson would have acted the same way if the trial court, in response to his first demand, had undertaken in a proper manner to acquaint him with the problems he faced, then it seems to me that the trial court's failure to hold such a hearing could not be deemed as being ratified because six months after the sentencing hearing, he acted in the manner in which he did.

I would conclude that the failure of the trial court to respond affirmatively to his demand for the right to represent himself as required in *Faretta* was an absolute and final denial of that right which was not waived by his subsequent conduct. It seems to me a little naive for us to affirm the trial court's finding that Raulerson's "vacillation" amounted to waiver. Whatever vacillation appears in the record as it now stands was, it seems to me, the fault of the trial judge, whose vacillation could hardly be expected to have been treated by a non-lawyer defendant any differently than it was.

As to the second basis of my disagreement, I think the treatment by this Court of Raulerson's failure "to pursue the matter" of his demand to represent himself ignores the provisions of Rule 46 F.R. Cr.P. This rule states:

> formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling of the court is made or sought, makes known to the court the action which he desires the court to take ... and his grounds therefor; ....

The effect of the Court's decision here is that when the trial court denied his request, Raulerson was obliged to renew his demand. This is nothing more or less, it seems to me, than requiring him to make an "exception" to the court's ruling.

I would remand for a further sentencing hearing.

Appendix B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JUN 11 1984
SPENCER D. MERCER
CLERK

No. 83-3541

JAMES DAVID RAULERSON,

Petitioner-Appellant,

versus

LOUIE L. WAINWRIGHT, Secretary, Florida Dept. of Offender Rehabilitation, RICHARD DUGGER, Superintendent of Florida State Prison at Starke, Florida, and JIM SMITH, Attorney General of the State of Florida,

Respondents-Appellees.

Appeal from the United States District Court for the Middle District of Florida

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion MAY 1, 1984, 11 Cir., 198_, ____F.2d____).

(JUNE 11, 1984)

Before FAY and HENDERSON, Circuit Judges and TUTTLE, Senior Circuit Jud

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge.

REHC-6

Appendix C

The Florida Death Penalty Statute

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence

(1) **Separate proceedings on issue of penalty.**—

Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by § 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) **Advisory sentence by the jury.**—

After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) **Findings in support of sentence of death.**—

Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with § 775.082.

(4) **Review of judgment and sentence.**—

The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) **Aggravating circumstances.**—

Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) **Mitigating circumstances.**—

Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

Appendix D

FILED

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

SEP 7 10 00 PM '83

CLERK
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE, FLORIDA

JAMES DAVID RAULERSON,

Petitioner,

vs. No. 83-813-Civ-J-16

LOUIS L. WAINWRIGHT, Secretary, Florida Department of Offender Rehabilitation, RICHARD DUGGER, Superintendent of Florida State Prison at Starke, Florida, and JIM SMITH, Attorney General of the State of Florida,

Respondents.

ORDER ON PETITION FOR WRIT OF HABEAS CORPUS AND
ORDER ON MOTION FOR STAY OF EXECUTION OF SENTENCE OF DEATH

The petitioner, JAMES DAVID RAULERSON, has filed his petition for writ of habeas corpus in the Middle District of Florida on September 2, 1983. In conjunction with his petition, he has filed an application for a stay of execution of the sentence of death, scheduled for September 7, 1983, at 7:00 o'clock a.m. On September 6, 1983, this Court conducted an evidentiary hearing on the petition, after which this Court entered a temporary stay of execution of the death sentence until September 9, 1983, at 7:00 o'clock a.m.

Factual History

On April 27, 1975, some time after 10:00 o'clock p.m., the petitioner and an accomplice entered the Sailmaker Restaurant at Jacksonville, Florida. Immediately prior to entering the restaurant from the rear entrance, the petitioner was confronted by an employee of the restaurant in the rear parking lot, at which time the employee was taking out the garbage. At this time the petitioner was not masked and the employee subsequently identified the petitioner. The petitioner thereupon forced the employee at gunpoint to reenter the restaurant and lie face down on the kitchen floor. Prior to entering the restaurant, the petitioner placed a ski mask over his head. Other employees also were required to lie face down on the kitchen floor. The petitioner and his accomplice thereupon proceeded to rob the restaurant of its evening proceeds, the petitioner entering the office of the owners and making them, a husband and wife, also lie face down on the floor. After taking the proceeds from the office, the petitioner proceeded to another part of the restaurant and committed a sexual assault upon a waitress, all while the accomplice was standing guard over the various persons lying on the floor.

Upon receiving a report of a robbery in progress, two police officers arrived on the scene. Officers English and Stewart, in that order, approached the rear door of the restaurant. Upon opening the door, Officer English was confronted with the accomplice, an individual standing approximately six feet six

inches and weighing 250 pounds, who was pointing an automatic pistol at the officer. The officer immediately fired his weapon at the accomplice who fell to the ground. Realizing that the accomplice was not dead, Officer English kneeled down to place handcuffs upon him. While doing so, the petitioner, having completed his sexual assault, appeared in the hallway leading to the kitchen and the backdoor, firing his revolver. Officer English fired two shots, one striking the petitioner and the other going astray. Officer Stewart commenced firing his weapon but in the process was fatally struck by a bullet from the petitioner's weapon.

Investigation revealed that no shots had been fired from the accomplice's automatic weapon and that the petitioner's weapon had been emptied. As a result of the incident the accomplice and Officer Stewart expired. The petitioner was arrested at the scene and removed to the hospital.

Procedural History

The petitioner was tried before a jury commencing August 4, 1975. The jury returned a verdict of guilty of murder in the first degree on August 6, 1975, after which the penalty phase of the bifurcated jury trial was commenced. The penalty phase continued on August 7, 1975, on which day the jury returned a recommendation that the death penalty be imposed. The trial judge ordered a presentence investigation report and on

August 20, 1975, after receiving the presentence investigation report, the trial judge sentenced the petitioner to death. Petitioner's conviction and sentence were affirmed on direct appeal to the Supreme Court of Florida. Raulerson v. State, 358 So.2d 826 (Fla. 1978), cert. denied, 439 U.S. 959 (1978). On March 23, 1979, the petitioner filed a petition for writ of habeas corpus in this court, contending a violation of Gardner v. Florida, 430 U.S. 349 (1977), because he had not been shown or made aware of the contents of the presentence investigation report prior to his sentencing, although his counsel had received two copies of said report and had discussed mitigation with the petitioner.

While the petition for habeas corpus was pending in this Court, the Governor of Florida signed a warrant directing that the petitioner be executed between May 16 and May 23, 1980. Thereupon, a motion to expedite consideration of the petition for habeas corpus was filed with this Court and, on April 24, 1980, the petitioner filed an application for stay of execution pending final disposition of his petition. This Court granted the respondents' motion to expedite and, on May 9, 1980, granted the petition for habeas corpus, vacating the sentence and remanding the cause to the State of Florida for resentencing within 60 days. The 60-day requirement was ultimately enlarged by this Court. The respondent filed a petition for rehearing on May 19, 1980, which the Court denied on June 24, 1980. The petitioner was resentenced to death on August 12, 1980.

During the trial of this case, the petitioner was represented by retained counsel. After conviction and sentencing, the Public Defender for the Second Judicial Circuit of Florida was appointed to represent the petitioner on his appeal. The Public Defender also represented the petitioner at his second sentencing proceeding in August 1980. Prior to the second sentencing, the public defender, on April 30, 1980, filed a motion for post-conviction relief in the Circuit Court of the Fourth Judicial Circuit of Florida. This motion was denied on May 14, 1980, without an evidentiary hearing. The denial of this motion for post-conviction relief in the Circuit Court was appealed to the Florida Supreme Court and consolidated with the appeal from the petitioner's second sentencing. The Florida Supreme Court affirmed the denial of the motion for post-conviction relief and the second sentencing on August 26, 1982. Raulerson v. State, 420 So.2d 567 (Fla. 1982), reh'g denied November 3, 1982, cert. denied 103 S.Ct. 3572 (1983).

On August 5, 1983, the Governor of Florida again issued a warrant directing that the petitioner be executed during the week commencing at noon, September 2, 1983, and execution was scheduled for 7:00 a.m., September 7, 1983. New counsel for the petitioner filed another motion for post-conviction relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure on August 22, 1983, in the Circuit Court of the Fourth Judicial Circuit of Florida. The Circuit Court denied relief on August 30, 1983, and further denied petitioner's application for

a stay of execution. An immediate appeal to the Supreme Court of Florida was instituted and the denial of post-conviction relief was affirmed by the Supreme Court of Florida on September 1, 1983. Raulerson v. State, _____ So.2d _____, Case Nos. 64,181 and 64,182, September 1, 1983. The petition at bar was filed on September 2, 1983, as aforementioned.

Legal Issues

The petitioner raises eight grounds for relief by way of petition for habeas corpus which will be discussed seriatim. The Court has thoroughly reviewed the transcripts and all proceedings in the State court together with three opinions of the Florida Supreme Court.

The first issue raised by the petitioner is the ineffective assistance of his counsel at the bifurcated trial in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution. Among the grounds alleged to demonstrate the ineffective assistance of counsel are the following: (a) the failure to be an advocate for petitioner from the commencement of voir dire examination through the sentencing phase of the trial, (b) failure to provide conflict-free representation because counsel was retained for the sum of $5,000 which was to include costs and attorney's fees, (c) the failure to constitutionally attack Florida's death penalty statute, (d) the failure to move for a change of venue in light of pretrial publicity,

(e) failure to object to the prosecutor's inflammatory references about the petitioner, (f) failure to object to the Court's failure to instruct the jury on the element of specific intent regarding robbery, (g) failure to consult with the petitioner regarding the presentence investigation report, (h) failure to object to the State's introduction of evidence at the penalty phase of the trial of a prior criminal offense for which petitioner had not been convicted, (i) failure to make proper objections at the sentencing phase of the trial regarding jury instructions, (j) failure to make a proper closing argument during the sentencing phase of the trial, (k) failure to investigate petitioner's background and character and to present evidence in mitigation at the sentencing phase, (l) failure of the Court to allow petitioner's counsel to withdraw after said counsel's competency was allegedly under attack, (m) counsel's continued representation of petitioner after realization of a conflict in violation of petitioner's Sixth and Fourteenth Amendment rights, (n) failure to determine the nature and purpose of the second sentencing hearing, (o) failure to make a timely, intensive preparation for the second sentencing, (p) failure to introduce petitioner's hospital records or evidence of his abuse by officers upon his arrest at the second sentencing hearing, (q) failure to offer any closing argument on behalf of petitioner at the second sentencing hearing, and (r) failure to obtain an evidentiary hearing in State court on the claim of ineffective assistance of counsel.

At the outset it is noted that counsel for the petitioner at the trial realized that he had a virtually indefensible case. Thus, his strategy was to confine his defense solely to putting the State to its burden of proof. This he did to the best of his ability. In retrospect, it is often easy to be a Monday-morning quarterback, but a finding of constitutionally ineffective representation is not premised upon Monday-morning quarterbacking. Counsel's strategy was to present a good image to the jury by avoiding unnecessary questioning and unnecessary objections, and in the sentencing phase, to place only his youthful client on the witness stand, hoping to incur the sympathy of the jury. That this strategy backfired should not now be considered constitutionally ineffective representation. As the Court stated in Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983), "Even where an attorney's strategy may appear wrong in retrospect, a finding of constitutionally ineffective representation is not automatically mandated." In the instant case, petitioner's counsel had been a practitioner for approximately twelve years during which time fifty per cent of his practice was in criminal law. He had handled a number of capital cases and was well-versed in criminal law. Of some one hundred prospective witnesses listed by the State, approximately fifteen were called to testify at trial, many of these being chain-of-custody witnesses. Counsel deposed the State's ten primary witnesses prior to trial and developed his strategy in accordance with his knowledge of the case and his experience of some twelve years of trying criminal cases.

Although others may have chosen different strategies, this Court, in considering the totality of the circumstances, cannot make the determination that counsel did not provide reasonably effective assistance of counsel to the petitioner.

Notwithstanding the pretrial publicity involved in this case, only two of the veniremen had any prior knowledge of the case. Counsel did discuss with the trial Court the possibility of a change of venue and was advised that a change of venue would not be granted unless the Court was unable to impanel an impartial jury. Thus, the failure to move for a change of venue or to move for sequestered voir dire examination cannot be viewed as an error in judgment or as ineffective assistance of counsel.

All of those remaining issues about which petitioner now complains regarding ineffective assistance of trial counsel were either negated by the facts, were the result of a calculated judgment to avoid antagonizing the jury, or are legally insufficient.

With specific reference to the penalty or sentencing phase of the trial, counsel's strategy was to merely put the petitioner on the witness stand hopefully to incur the sympathy of the jury. At the insistence of the petitioner, counsel proceeded with calling three doctors, two of whom were Court-appointed psychiatrists and one of whom was a doctor who witnessed the petitioner at the hospital immediately after the incident giving rise to the first-degree murder charge. This was done at the petitioner's insistence and against counsel's advice. True, the petitioner's

counsel acknowledges the weakness of his final argument at this stage of the proceedings; however, this final argument is consistent with his strategical approach to this case from its inception. Additionally, the trial Court, as required by law, made independent findings regarding the aggravating and mitigating circumstances, and a second trial Court reviewed all of the prior proceedings before sentencing the petitioner for the second time.

The Court will now consider the second sentencing hearing and matters preceding it. Prior to the second sentencing hearing, then counsel for the petitioner filed a motion for post-conviction relief to which the State responded with a motion to dismiss. For reasons unknown to the Court, petitioner's then counsel took the motion to dismiss personally and moved to withdraw. The trial Court denied the motion to withdraw and the motion for post-conviction relief also was denied. Thereafter, the resentencing was set for July 15, 1980, but at the request of defense counsel, the Court continued the resentencing to a later date and conducted a status conference at the July 15, 1980 hearing. The Court advised counsel that sentencing would be on August 11, 1980, contingent upon counsel's obtaining an extension of time from this Court, which extension was granted on July 16, 1980. Counsel therefore had, <u>at a minimum</u>, from July 16, 1980 to August 11, 1980 to prepare for resentencing. The petitioner now complains that counsel was not prepared for the resentencing, notwithstanding the fact that six witnesses testified on his

behalf and counsel had represented petitioner for approximately five years. The petitioner contends that other witnesses were available to testify to his background and character but that time did not permit their being called to testify. This Court now finds that, with minor exceptions, the witnesses whose affidavits have been filed with the petition in this case are merely cumulative of the testimony of the witnesses who did testify at the resentencing hearing. Accordingly, this Court finds that petitioner was afforded reasonably effective assistance of counsel at all stages in the proceedings.

Petitioner next contends that he is entitled to habeas corpus relief because of a vague and overbroad application of aggravating circumstances and failure to recognize and weigh mitigating circumstances. In sentencing the petitioner to death, the trial Court found from the evidence that five statutory aggravating circumstances existed: that petitioner created a great risk of death to many persons, that the murder was committed immediately after a rape, that the murder was committed in an effort to avoid lawful arrest, that the murder was committed for pecuniary gain, and that the murder was especially heinous, atrocious and cruel. Although the Florida Supreme Court found error in the finding that the murder was especially heinous, atrocious or cruel, it also found that such error was harmless because the petitioner had failed to prove the existence of any mitigating circumstances.

Under Florida law, when an improper aggravating circumstance is considered and there exist any mitigating circumstances, the cause must be remanded for resentencing. Sireci v. State, 399 So.2d 964 (Fla. 1981), Elledge v. State, 346 So.2d 998 (Fla. 1977). Here, the Supreme Court invalidated one of the statutory aggravating circumstances. The trial Court considered the evidence in mitigation and rejected it, finding that the evidence did not constitute mitigating circumstances "within the meaning of Lockett v. Ohio." 98 S.Ct. 2954 (1978). The Court also stated that there were no statutory mitigating circumstances including no evidence of extreme mental or emotional disturbance at the time of the crime. As the Florida Supreme Court stated:

> Appellant clearly is unhappy with the conclusions, but they are within the domain of the sentencing court and we find nothing in the record which mandates a different result. The judge was not compelled to call the experts requested, and since he did consider the question, we will not fault his conclusions."

Raulerson v. State, 420 So.2d 567 at 572. This Court agrees.

Petitioner's third contention is that he was denied a fair hearing on the issue of punishment at his second sentencing hearing because counsel representing him was not prepared. At the commencement of the resentencing hearing, counsel stated that he had been representing the petitioner for approximately five years, and that because he expected the State to appeal the federal court order, he had "not directed my attention in any way or shape or fashion to investigating the facts, the witnesses, interviewing them." He went on to state that he had had only six

weeks, "more like a month," to prepare for the sentencing hearing. Contrary to his representations, however, he had subpoenaed six witnesses to testify at the sentencing hearing; two from Ohio, two from Georgia, and two from Florida. The trial Court justifiably denied his motion for continuance and all other motions which were filed five days prior to the sentencing hearing. Counsel previously filed an 87-page memorandum in support of his motion for post-conviction relief, which memorandum was all-inclusive. The sentencing hearing proceeded, and all six of the petitioner's witnesses testified regarding his character, upbringing, and general background. The hearing commenced at 10:00 a.m. and counsel were afforded approximately two hours for the luncheon recess. It should be noted that this was not a case of a single counsel representing the petitioner. Two assistant public defenders appeared on behalf of the petitioner as did a law student assisting the two lawyers. At approximately 7:00 p.m., the Court asked for final arguments. Counsel for petitioner represented that they were "exhausted" and refused to present final arguments to the Court, whereupon the Court offered them a dinner recess which they refused. Because they continued to refuse to make final argument, the Court announced the next morning that it had considered their lengthy memorandum in lieu of final argument. The Court further considered the testimony at the prior sentencing hearing and the presentence investigation report.

The petitioner has cited this Court to the recent decision of the United States Court of Appeals for the Eleventh Circuit in King v. Strickland, _____ F.2d _____, (11th Cir. No. 82-5306, Sept. 2, 1983). This Court finds the King case distinguishable. In King, counsel failed to investigate and prepare for the sentencing hearing, and more importantly, presented a final argument that in the words of Judge Roney, "may have done more harm than good." Here, in lieu of final argument, the Court considered a professionally-prepared, all-inclusive, exhaustive memorandum submitted to the Court by counsel. Moreover, the Court had the benefit of a prior sentencing and the testimony adduced at that sentencing hearing. The Court finds that petitioner was afforded a full, fair and constitutional sentencing proceeding.

Petitioner's next contention is that the trial Court's instructions to the jury at the first sentencing hearing failed to meet constitutional muster as violative of the Eighth and Thirteenth Amendments to the United States Constitution. He first argues that the jury was not instructed on the definition of "especially heinous, atrocious and cruel." The meaning of this term is a matter of common knowledge. Alford v. State, 307 So.2d 433 (Fla. 1975). Petitioner also contends that the jury was not instructed on what would constitute impermissible doubling of factors in aggravation. The Court finds this contention without merit. Initially, there is no evidence that the jury doubled up aggravating factors. Secondly, even if there had been a doubling of the aggravating factors, where there are no

mitigating circumstances a sentence of death may be upheld. Jackson v. State, 359 So.2d 1190 (Fla. 1978). Petitioner further argues that the jury was not instructed that it could consider mitigating factors not listed in the statutory mitigating circumstances. Contrary to this contention, the Court specifically instructed the jury that "all evidence of mitigating circumstances may be considered by the jury." Furthermore, the Court allowed the jury to hear testimony of three doctors and the petitioner, no one of whom testified regarding specific statutory mitigating circumstances.

The petitioner also argues that the jury was instructed that death is presumed to be the proper sentence if one or more aggravating circumstances were found unless they were overridden by one or more mitigating circumstances. This is a correct statement of the law in Florida. State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). In this regard, the petitioner also argues that the jury was not instructed that it had to find that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt. This contention is foreclosed by Ford v. Strickland, supra.

Petitioner's fifth argument addresses the issue in Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981), cert. denied, 454 U.S. 1000 (1981), concerning the matter of non-record material before the Florida Supreme Court. This issue has been resolved against the petitioner in Ford v. Strickland, supra.

The next argument raised by petitioner is whether the ruling of Brady v. Maryland, 373 U.S. 83 (1963), applies to a capital sentencing hearing and, if so, whether the State's actions here violated petitioner's rights. During the second sentencing hearing, petitioner filed a demand for exculpatory evidence, seeking to discover any possibly mitigating information known to the State. Although counsel representing the State stated that he did not feel that Brady applied in a sentencing hearing, he further stated that "I can certainly tell the Court that at least, off the top of my head, I can't think of anything that would go to mitigating this defendant's previous sentence of death." There is no question that Brady is applicable at the sentencing phase of a trial as well as the guilt determination phase. Raulerson v. State, 420 So.2d 567, at 573. There is no evidence, however, that any Brady material existed. To the contrary, when the assistant state attorney was pressed for information, he affirmatively stated that "the State knows of none, your Honor." It is noted that this was the same assistant state attorney who investigated and prosecuted the trial from its initial stages through the sentencing proceeding. In light of the general nature of the demand, this Court finds that the response was adequate to satisfy Brady.

Petitioner's last two arguments concern the failure of the trial Court to allow him to represent himself at the second sentencing hearing, Faretta v. California, 422 U.S. 806 (1975), and the failure of his counsel to raise the Faretta issue on

appeal. The first time petitioner even peripherally approached the subject of self-representation was at the July 15, 1980 status hearing before the trial Court when he requested to be appointed as co-counsel for himself. The Court denied his motion. Subsequently, the petitioner forwarded a letter dated July 18, 1980 to the Court in which he requested to appear pro se citing Faretta. The Court forwarded a copy of that letter to the public defender's office for the Second Judicial Circuit of Florida, but the assistant public defender representing the petitioner testified that he never received it although it was in the public defender's file. Nevertheless, at the commencement of the sentencing hearing some twenty-four days after the date of the petitioner's letter, the trial Court initially allowed the petitioner to act as co-counsel. This was in response to a question from the Court as to whether the petitioner wanted to act as co-counsel, to which question he responded in the affirmative. During the hearing, the Court's attention was directed to State v. Tait, 387 So.2d 338 (Fla. 1980), and the Court removed petitioner as co-counsel. Petitioner made no objection, thus waiving any right to appeal. Under such circumstances, it cannot be said that the petitioner "clearly and unequivocally" declared that he wished to represent himself and did not want counsel. See, Faretta, supra, at 2541. Furthermore, it cannot be said that the petitioner made his request "at the outset." When a defendant chooses, at the outset, to accept counsel as his representative he allocates to counsel the power to make binding decisions

during the trial. See, Faretta, supra, at 2534. The converse of this must be true. If the defendant fails, at the outset, to allocate to himself the making of trial decisions, he should not thereafter be permitted to disrupt the orderly administration of justice by seeking to represent himself. It can hardly be said that the defendant made his request to represent himself "at the outset." This issue was not raised again until February 1981, after the Supreme Court of Florida relinquished jurisdiction for the trial Court to determine under Faretta whether the petitioner should be allowed to represent himself on appeal. The trial Court proceeded to inquire of the petitioner regarding his ability to represent himself and whether his waiver of counsel would be freely and intelligently made. During the inquiry, petitioner became disturbed and abruptly left the courtroom. It is difficult to see how this scenario of facts rises to constitutional proportions. The defendant first wanted to proceed pro se; then he wanted to proceed as co-counsel; and finally, he again wanted to proceed pro se. Such vacillation cannot be tolerated. See, Chapman v. United States, 553 F.2d 886, 893, n.12 (5th Cir. 1977). Although the Supreme Court of Florida determined that petitioner had waived this issue by not raising it on direct appeal, it nevertheless found the issue without merit because of the failure of the petitioner to make an unequivocal demand to represent himself. Thus, this Court has considered the issue and finds it to be without merit.

Having considered all of the issues raised on the merits by the petitioner, the Court will now consider petitioner's prayer that he be allowed a period of sixty days within which to brief the issues of law raised by his petition. The issues having been fully briefed in the petition for habeas corpus itself and in the memorandum supporting the motion for stay of execution, and having announced a denial of such request in open court, the request will be denied.

Accordingly, it is ORDERED AND ADJUDGED as follows:

1. The petition for writ of habeas corpus be and the same is hereby DENIED.

2. Petitioner's motion for an additional sixty days within which to brief the issues of law raised by his petition be and the same is hereby DENIED.

3. In order to allow the petitioner an opportunity to perfect an appeal of this decision and to seek a further stay of execution from the United States Court of Appeals for the Eleventh Circuit, this Court's temporary stay of execution, staying the execution of the death penalty until 7:00 o'clock a.m. on Friday, September 9, 1983, shall remain in full force and effect.

DONE AND ORDERED in Chambers at Jacksonville, Florida, this 7th day of September, 1983, at 9:45 p.m.

UNITED STATES DISTRICT JUDGE

Copies to:
All counsel of record

Appendix E

The following is the entire closing argument given by counsel for Mr. Raulerson, Walter Stedeford, at the sentencing phase of petitioner's trial in 1975:

> Ladies and gentleman, the Statute Mr. Greene [the prosecutor] is referring to is --
>
> As the Judge told you, you must render an Advisory Sentence, Advisory Opinion, advise the Court. The Court does not have to follow that. In my own mind, I have often wondered why you were called on to do that. The Judge makes it, it's up to her. In this case, Judge Black. She is the one who meets out any sentence to my client. So, whatever you do will not be -- may not be followed by the Court.
>
> As I stood before you yesterday afternoon or yesterday morning and argued and you brought back a verdict, I felt as though anything I said had fallen on totally deaf ears. I'm not ashamed of that, I'm not admonishing it, I'm merely saying whatever I said yesterday was good for my client.
>
> It is awfully hard to argue for a man's life. I have done it too many times, it never gets easy. I feel at this time that whatever I said yesterday I feel very strongly about. I was totally unsuccessful to persuade you to my client's position. My feelings now -- it's my feelings now that I must try to persuade you against the death penalty as Mr. Greene was trying to persuade you for the death penalty. And I feel as though I fell down on my job yesterday and I do not feel as though I can persuade you now that I felt very strong yesterday about my client should have been brought back a verdict other than what was.
>
> [An objection by the prosecutor was overruled.]

As I told you yesterday, it's hard to get your train of thought back. I said I have done this too many times to find it easy. It's terribly difficult when a man is facing a conviction of Murder in the First Degree and facing twelve citizens of your community who found him guilty of unlawful homicide, guilty of Murder in the First Degree and, in this case, the killing of a police officer.

It's extremely difficult for me now after having argued for two or three days to feel that I'm very effective in front of you. I feel as though my effectiveness is at a very low end. It is very hard.

You heard all of the testimony, I'll say nothing further on behalf of my client other than just weigh and consider your decision.

Thank you.

T. Tr. at 545-547.

OPPOSITION BRIEF

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES DAVID RAULERSON,

Petitioner,

-v- No. 84-5247

LOUIS L. WAINWRIGHT,
et al.,

Respondent.

BRIEF IN OPPOSITION
TO
PETITION FOR A WRIT OF CERTIORARI

JIM SMITH
Attorney General

WALLACE E. ALLBRITTON
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(Restated)

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II.

WHETHER PETITIONER WAIVED HIS SIXTH AMENDMENT RIGHT TO SELF-REPRESENTATION.

III.

WHETHER THE DECISION OF THE LOWER COURT IS IN CONFLICT WITH THE DECISION OF THIS COURT IN Eddings v. Oklahoma, 455 U.S. 104 (1982).

IV.

WHETHER PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

V.

WHETHER THE REPRESENTATION RECEIVED BY PETITIONER MEETS THE STANDARDS ANNOUNCED BY THIS COURT IN Strickland v. Washington, ___U.S.___, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984).

OPINIONS BELOW

Petitioner's allegations designating the opinions below are correct and acceptable to respondents.

JURISDICTION

Petitioner's jurisdictional allegations are acceptable to respondents.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents accept the constitutional and statutory provisions involved as set forth on p. 2 of the petition.

PRELIMINARY STATEMENT

References to the appendix submitted with the petition will be made by the symbol "PA" followed by appropriate page number. Any other references will be specifically designated.

STATEMENT OF THE CASE

A. Prior Proceedings

Petitioner's allegations under this subheading as set forth on pp. 2-4 of the petition are acceptable to respondents. However, for the convenience of the Court, respondents set forth the prior proceedings as recited in the opinion of the court below:

> In August of 1975 Raulerson was convicted of first degree murder and sentenced to death. The conviction and sentence were affirmed on appeal. **See Raulerson v. State**, 358 So.2d 826 (Fla.), **cert. denied**, 439 U.S. 959, 99 S.Ct. 364, 58 L.Ed.2d 352 (1978). Subsequently, he filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Florida. That court found that Raulerson had been denied the opportunity to rebut the contents of his presentence report in violation of **Gardner v. Florida**, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), and ordered a new sentencing hearing. **See Raulerson v. Wainwright**, 508 F.Supp. 381, 383-85 (M.D.Fla.1980). Raulerson was again sentenced to death. The Florida Supreme Court consolidated the appeals from the denial of post conviction relief and reimposition of the death penalty and affirmed both judgments. **See Raulerson v. State**, 420 So.2d 567 (Fla.1982), **cert. denied**, ___U.S.___, 103 S.Ct. 3572, 77 L.Ed.2d 1412 (1983).
>
> The state set Raulerson's execution for September 7, 1983. On August 22, 1983, he filed a second petition for post conviction relief in the Circuit Court of Duval County under Rule 3.850 of the Florida Rules of Criminal Procedure. The circuit court denied both the petition and a motion for a stay of execution. The Florida Supreme Court again affirmed. **See Raulerson v. State**, 437 So.2d 1105 (Fla.1983).
>
> On September 2, 1983, Raulerson filed this habeas corpus petition in the United States District Court for the Middle District of Florida. The court held an evidentiary hearing on September 6, 1983, and granted a temporary stay of execution. Ultimately, the district court denied the writ and lifted the stay but granted a certificate of probable cause to appeal.

[Footnote omitted.] Raulerson, 732 F.2d 805.

B. Statement of Facts

The allegations set forth in the petition under this subheading are unacceptable to respondents. However, the facts as found by the Florida Supreme Court in Raulerson v. State, 358 So.2d 826, 828 (Fla. 1978), are acceptable to respondents and are set forth below:

> The defendant, Raulerson, at approximately 11:00 o'clock p. m., Sunday night, April 27, 1975, walked to the back door of the Sailmaker restaurant in Jacksonville, Florida, where he pointed a .38 caliber revolver at Leonard J. Wilson, a young man working at the restaurant. Raulerson then pulled a wool mask over his head, forcing Wilson to enter the restaurant and lie face down on the floor, Raulerson went to the manager's office where the manager, Robert E. Couture, was sitting with his wife, Nancy Couture, "cashing out receipts" for the restaurant. He forced them to lie on the floor with their face down and then was heard scooping the restaurant's money off the table. Raulerson, after cutting the telephone wire, went to the back of the restaurant where everyone present was forced to lie down with

Raulerson then took a young secondary school art teacher who was working evenings at the restaurant, to a back room with him. He forced her to take off her clothes and place her mouth on his penis. He then inserted his penis in her vagina, later pulling his penis out of her vagina and ejaculating on her stomach.

In the meantime, Raulerson's cousin, Jerry Leon Tant, wearing a mask similar to the one worn by Raulerson, was standing guard over the others in the restaurant. Officer English, answering a call, came to the scene and started pushing a buzzer at the door of the restaurant. When there was no response to the buzzer, Officer English opened the door, saw Tant standing at the door with the mask on and an automatic pistol in his hand. He shot Tant with Tant falling to the floor. Officer English then bent over Tant.

Raulerson at this time left the young art teacher, went out into the main part of the restaurant, saw Officer English bending over Tant, and shot Officer English in the chest after which Officer English cried out that he was hurt. Officer Stewart, who was standing behind Officer English, started shooting Tant who was moving. Raulerson fired five more shots from his revolver, emptying the revolver and shooting Officer Stewart in the heart killing him. During this period there were approximately fifteen shots fired. Raulerson then ran from the immediate scene of the shooting clutching his side where he had been shot, trying to escape. After finding no viable escape route, Raulerson returned, took off his mask, laid down his gun, and surrendered.

An indictment was returned charging defendant with murder in the first degree. He was convicted and the sentence of death was imposed.

The facts as found by the district court in its order denying petition for writ of habeas corpus (petitioner's appendix D, pp. 2, 3) are also acceptable to respondents.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. PETITIONER WAS NOT DENIED HIS CONSTITUTIONAL RIGHT OF SELF-REPRESENTATION.

Petitioner urges that because he wrote a letter on July 18, 1980, requesting to represent himself but was never permitted to do so by the trial court constitutes a denial of his constitutional right of self-representation. Nothing could be further from the truth.

Following a status hearing on July 15, 1980, petitioner sent a letter dated July 18, 1980 to the trial court requesting to be permitted to act as his own counsel. (PCR II at 6)* Prior to the writing of his letter, petitioner at the status hearing held July 15, 1980, had made a request to act as cocounsel with his then counsel, David Busch. The trial court, at that time, denied the request (Tr.Hrg. 7/15/1980, at 15, 16).

Subsequently, the matter came up again at petitioner's resentencing on August 11, 12, 1980. The trial court revisited its earlier ruling and permitted petitioner to act as cocounsel with Mr. Busch, basing its ruling on Tait v. State, 362 So.2d 292 (Fla. 4th DCA 1978). (Tr.Hrg. 3/11-12/1980, at 5.) Petitioner concurred with the trial court's ruling allowing him to act as cocounsel with Mr. Busch and did not at that time, nor at any other time during the resentencing, request to represent himself without the aid of counsel (Tr.Hrg. 8/11-12/1980, at 7). Later during the course of the resentencing, it came to the attention of the trial court that the Tait case upon which it had relied had been overruled by the Florida Supreme Court in State v. Tait, 387 So.2d 338 (Fla. 1980), and that under Florida law a defendant

* PCR II refers to the record on appeal from the denial of post-conviction relief on August 30, 1983.

did not have the right to "hybrid representation." (Tr.Hrg. 8/11-12/1980, at 189).

Thereafter at a hearing held on February 6, 1981, petitioner in open court requested to represent himself. At that point the trial court initiated a hearing required by Faretta v. California, 422 U.S. 806 (1975), and continued the hearing until petitioner abandoned his request to represent himself by abruptly leaving the courtroom in the middle of the inquiry (Tr.Hrg. 2/6/81, at 14-16).

The right to counsel under the Sixth Amendment is in force until **waived**, unlike the right to self-representation which must be **asserted** before it attaches. Brown v. Wainwright, 665 F.2d 607, 610 (5th Cir. 1982). And even though an individual requests the right to represent himself, he may waive that right through subsequent conduct which indicates that he has abandoned the request altogether. Id. at 611.

In the instant case, petitioner failed to make an unequivocal request to represent himself. On July 15, 1980, petitioner made the request to act as cocounsel with Mr. Busch. Three days later on July 18, 1980, by letter to the court, petitioner made the request to represent himself. On August 11, 12, 1980, petitioner made the request to act as cocounsel with Mr. Busch. Initially, as noted supra, petitioner was allowed to act as cocounsel with Mr. Busch. However, when he was told that the law in Florida had changed and that he did not have the right to act as cocounsel, petitioner did not protest the court's decision nor request the court to allow him to represent himself.

It is submitted that by thus vascillating and accepting the court's offer of corepresentation, petitioner abandoned the July 18, 1980 request to represent himself. Petitioner did not, under the dictates of Faretta v. California, make an unequivocal

request to represent himself. The district court in its order denying the petition for habeas corpus put the matter thusly:

> Nevertheless, at the commencement of the sentencing hearing some twenty-four days after the date of the petitioner's letter, the trial Court initially allowed the petitioner to act as co-counsel. This was in response to a question from the Court as to whether the petitioner wanted to act as co-counsel, to which question he responded in the affirmative. During the hearing, the Court's attention was directed to **State v. Tait**, 387 So.2d 338 (Fla. 1980), and the Court removed petitioner as cocounsel. Petitioner made no obhection, thus waiving any right to appeal. Under such circumstances, it cannot be said that the petitioner "clearly and unequivocally" declared that he wished to represent himself and did not want counsel. **See, Faretta, supra,** at 2541.

(Petitioner's Appendix D. p. 17)

The Eleventh Circuit in addressing this issue had this to say at 732 F.2d 808, 809:

> In light of these facts, we conclude that Raulerson failed to make an "unequivocal" assertion of his right to relinquish counsel until February 6, 1981. On that date, he did make known his desire to appear pro se but then waived it by voluntarily leaving the courtroom during the **Faretta** inquiry. Initially, Raulerson wrote a letter to the judge requesting to appear pro se but did not pursue the matter. Although a defendant need not "continually renew his request to represent himself even after it is conclusively denied by the trial judge," **Brown v. Wainwright,** 665 F.2d 607, 612 (5th Cir. 1982), he must pursue the matter diligently.
>
> The court took no immediate action upon receipt of Raulerson's letter. Thus, it did not conclusively deny the request at that time. When Raulerson subsequently requested and was granted the right to serve as co-counsel, he acquiesced without objection. Later, when this right was taken away, he failed, at that time, to notify the court of his desire to represent himself.

> [8] A defendant may waive his right of self-representation by electing to act as co-counsel. **See Brown v. Wainwright**, 665 F.2d 607, 611 (5th Cir.1982); **Chapman v. United States**, 553 F.2d 886, 893 n. 12 (5th Cir.1977). Even if Raulerson's letter of July 18, 1980 constituted a clear and unequivocal demand to represent himself, his agreement to proceed with the assistance of an attorney waived that original request until he reasserted it on February 6, 1981. At that time he made a valid assertion of his right and the court responded by initiating its required **Faretta** hearing. At this time he again waived his right to appear pro se when he voluntarily absented himself from the courtroom. His behavior on this occasion convinces us that he was not deprived of his constitutional right to appear pro se.

Moreover, Faretta v. California recognizes that "standby counsel" may be appointed to help the accused even when he represents himself. 422 U.S. 834, n. 46.

In his argument under this issue, petitioner seems to rely on Judge Tuttle's opinion, concurring in part and dissenting in part. Raulerson, 732 F.2d, at 813-814. Interestingly, respondents note that Judge Tuttle did not dissent from the denial of rehearing and suggestion for rehearing en banc, not even requesting that the court be polled on rehearing en banc (Petitioner's Appendix B).

II. THE TRIAL JUDGE CONSIDERED ALL EVIDENCE OF AGGRAVATING AND MITIGATING CIRCUMSTANCES AND SO STATED ON THE RECORD.

Petitioner contends that evidence of nonstatutory mitigating circumstances was ignored by the trial judge in violation of Lockett v. Ohio, 438 U.S. 586 (1978), and Eddings v. Oklahoma, 455 U.S. 104 (1982). This is incorrect.

At the second sentencing held on August 12, 1980, the trial court considered the testimony and evidence at the original trial in 1975, the advisory sentence by the jury, the presentence

investigation report, and the testimony and evidence presented at the sentencing hearing. (Tr.Hrg. 8/11-12/80, at 271). The trial court specifically stated on the record that it had considered all of the previous testimony and evidence in determining whether there were any statutory or nonstatutory mitigating circumstances (Tr.Hrg. 8/11-12/80, at 273). Moreover, in order to eliminate any possible future confusion, the trial court made the following statement on the record:

> (H) Nonstatutory mitigating circumstances.
>
> Finding: The Court has examined and considered the evidence to determine whether there are circumstances other than those specified in Section 821.141 Sub(6), Florida Statutes, which would mitigate the murder committed by the Defendant herein. The Court finds that there are no such nonstatutory mitigating circumstances within the meaning of **Lockett versus Ohio**.

Tr.Hrg. 8/11-12/80, at 279.

It is settled law in this jurisdiction that findings of a trial judge are factual matters which should not be disturbed unless there is an absence or lack of substantial or competent evidence to support those findings. Sireci v. State, 399 So.2d 964, 971 (Fla. 1981), citing Hargrave v. State, 366 So.2d 1 (Fla. 1978); Lucas v. State, 376 So.2d 1149 (Fla. 1979); Mikenas v. State, 407 So.2d 892 (Fla. 1981); Smith v. State, 407 So.2d 894, 901 (Fla. 1982); Teffeteller v. State, 439 So.2d 840 (Fla. 1983); Lemon v. State, ___So.2d)___(Fla. 1984), Case No. 63,410, opinion filed July 19, 1984. For example, in Mikenas, the court remarked as follows:

> In relation to defendant's second point, defendant argues that the new testimony heard by the court was not considered properly in its findings. The testimony heard consisted of two psychologists concerning the possibility of defendant's rehabilitation and a minister concerning his alleged progress in religion. Their testimony was not considered as a mitigating circumstance by the court. The testi-

> mony was apparently permitted by the trial court in an abundance of fairness to the defendant, but the court was not required to give it weight as a mitigating circumstance.

Id. at 893.

Decisional law out of the Eleventh Circuit is in agreement with Florida law. Just recently in Palmes v. Wainwright, 725 F.2d 1511 (11th Cir. 1984), in addressing the issue under consideration, had this to say:

> Appellant contends that the trial judge erred in not considering non-statutory mitigating factors that were presented during the sentencing hearing. In her judgment and order of death the trial judge discusses only the statutory aggravating and mitigating factors in Fla. Stat. §921.141. Again we cannot conclude that because the order discusses only the statutorily mandated factors that the other evidence in mitigation was not considered. Appellant's citation to **Eddings v. Oklahoma**, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), in which the Court held that a trial judge may not as a matter of law refuse to consider evidence of mitigation, is not persuasive. Here the trial judge patiently heard all of the evidence appellant had to offer. **The weight the trial judge gave to any one factor was wholly within her discretion. See Barclay v. Florida**, ___U.S.___, 193 S.Ct. 3418, 3430 n.2, 77 L.Ed.2d 1134 (1983)(Stevens and Powell, JJ. concurring). Our review is completed once it is established that a full hearing was conducted in which appellant's counsel was given an opportunity to present all of the mitigation evidence. There is no indication whatsoever that the trial judge did not conscientiously consider everything presented. [Emphasis ours.]

Id. at 1523.

The decision in Eddings v. Oklahoma, 455 U.S. 104 (1982), not only fails to support petitioner's position but, rather, is in complete harmony with Florida and Eleventh Circuit case law. Eddings holds that "[t]he sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant

mitigating evidence," and that "[i]n some cases, such evidence properly may be given little weight." Id. at 114, 115. As to the weight that should be given the evidence, the Eddings court pointedly stated "[w]e do not weigh the evidence for them." Id. at 117.

The reversal in Eddings was mandated because the trial judge did not evaluate the evidence in mitigation and find it wanting as a matter of fact, rather he found that as a matter of law he was unable even to consider the evidence. In the instant case, petitioner had every opportunity to present all the evidence he so desired at the hearing on August 11-12, 1980. Petitioner did not contend in the lower court and does not contend in this Court that any relevant mitigating evidence was excluded from his sentencing hearing. There has been no violation of Lockett v. Ohio, 438 U.S. 586 (1978). The Florida death penalty statute permits a defendant to present evidence as to any mitigating circumstance, Lockett requires the sentencer to listen. Eddings v. Oklahoma, 455 U.S. 104, 115 n. 10 (1982).

The lower court correctly concluded:

> In this case, the trial court explicitly demonstrated that it had met its constitutional burden. It heard extensive evidence in mitigation and then made an explicit finding: "The Court has examined and considered the evidence to determine whether there are circumstances, other than those specified [in the Florida statute], which would mitigate the murder comitted by the Defendant herein. The Court finds that there are not such non-statutory mitigating circumstances within the meaning of **Lockett v. Ohio**. . . ." There can be no clearer evidence that the trial court followed **Lockett's** dictates.
>
> In summary, **Lockett** stands for the proposition that the sentencer must **consider** all mitigating evidence. After so doing, it then is generally free to accord that evidence such weight in mitigation that it deems fit.

732 F.2d, at 807, 808. (Emphasis the court's.)

III. PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

Petitioner contends that he was denied reasonably effective assistance of counsel in 1975 when he was originally tried and sentenced, and in 1980 when he was resentenced pursuant to an order from the federal district court. Mr. Walter Stedeford represented petitioner in 1975 and David Busch, along with Louis Carres, represented him at resentencing 1980. Each will be dealt with separately.

A. Mr. Stedeford's Representation in 1975

Petitioner discourses at length in the petition on what he believes Mr. Stedeford failed to do in 1975. But on a more positive note, let's look at Mr. Stedeford's representation and see what he did do. Then, we will be in a better position to determine if Stedeford's representation was effective.

Reduced and made a part of this brief as the appendix is the affidavit of Mr. Stedeford concerning his representation of petitioner in 1975. The affidavit was made a part of the record on appeal filed in the lower court and can be found in Vol.II, pp. 235-238, Docket No. WW-30). Stedeford testified at the hearing held by the district court on September 6, 1983 that prior to executing this affidavit he had reread the entire trial transcript of the 1975 proceedings and that his memory was fresher at the time he executed the affidavit than it was on September 6, 1983, when Mr. Bright examined him on behalf of petitioner (DCt.Tr. 63, 64).*

Before undertaking petitioner's defense in 1975, Mr. Stedeford had extensive experience in the field of criminal

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* Reference is to the transcript of the habeas corpus hearing before the United States District Court for the Middle District of Florida held on September 6, 1983.

law. He had tried two or three capital cases and a "couple of dozen" felony jury trials (D.Ct.Tr. 64). Mr. Stedeford had engaged in the practice of criminal law for approximately twelve or thirteen years prior to 1975 and approximately fifty percent of his practice involved criminal law (D.Ct.Tr. 64).

In undertaking petitioner's defense, Stedeford employed the services of a psychiatrist or psychologist for the purpose of establishing an insanity defense and was of the opinion that there was no need to hire other experts for the purpose of defending petitioner (D.Ct.Tr. 64-66). Also, Mr. Stedeford deposed the principal witnesses in preparing petitioner's defense (D.Ct.Tr. 66).

At the habeas hearing Stedeford testified that it was possible that his file had been stripped of any notes or memoranda relating to the defense of petitioner and that various people had had access to his file over the intervening years D.Ct.Tr. 67, 68).

Mr. Stedeford testified that he had discussed with petitioner the various mitigating circumstances that he could have presented on petitioner's behalf (D.Ct.Tr. 69). Indeed, the record of the sentencing proceedings back in 1975 reflects the following exchange between Mr. Stedeford and the court:

> Your honor, Mr. Raulerson and I did discuss what mitigation he might bring before the Court. We, frankly, feel as though it would do little good to talk of mitigation in this case, and we feel as though you have considered it, and that Mr. Raulerson and I both concur that anything we might say would not change what you might be doing today.
>
> At this time, Your Honor, there's nothing further to say in mitigation.

(T.Tr.Aug.20, 1975, Sen.Hrg., p. 8) At the habeas hearing in federal court Mr. Stedeford testified that had petitioner suggested any additional mitigating circumstances or other miti-

gating evidence, he would have placed such material before the jury or the court (D.Ct.Tr. 70).

Mr. Stedeford's preparation for petitioner's trial was extensive. The reason his file did not reflect extensive research was because he had tried another capital case immediately prior to petitioner's case and the extensive research he had done in that case pertained directly to the legal issues raised in petitioner's case (D.Ct.Tr. 71). For instance, in the capital case prior to petitioner's case, Mr. Stedeford had researched the law concerning a change of venue because of publicity and had attempted to do so unsuccessfully in the prior case (D.Ct.Tr. 71, 72). Thus, in undertaking petitioner's defense, Mr. Stedeford was thoroughly familiar with the law surrounding a motion for change of venue on the ground of pretrial publicity. Moreover, Mr. Stedeford discussed a change of venue with the trial court, who indicated that if Mr. Stedeford had any difficulty in picking a jury because of pretrial publicity, the trial court would entertain a motion for change of venue (D.Ct.Tr. 72).*

During the guilt-innocence phase of the trial, Mr. Stedeford was in complete control, unfettered by petitioner (D.Ct.Tr. 76). However, when the trial entered the sentencing phase, petitioner began to insist on acting as "co-counsel" with Mr. Stedeford (D.Ct.Tr. 76). It was at the insistence of petitioner that the medical witnesses testified at the sentencing portion of the trial (D.Ct.Tr. 76).

---

* Petitioner has been unable to indicate any portion of the trial record which indicates that a change of venue was warranted. Mere pretrial publicity is not enough. Unless petitioner can point to a specific instance on the voir dire examination which indicates that pretrial publicity was a problem, this issue is moot. Dobbert v. Florida, 432 U.S. 282, 53 L.Ed.2d 344, 362, 97 S.Ct. 2290 (1977).

In the guilt-innocence phase of the trial, Mr. Stedeford believed the state's case to be so strong as to be virtually indefensible (D.Ct.Tr. 77). Interestingly, petitioner's expert, Robert Link, testified at the hearing in the district court to the effect that the prosecution's case was very strong and that petitioner only had a "weak defense." (D.Ct.Tr. 217). Consequently, Mr. Stedeford put forward the only legal defense possible; to put the state to its proof and point out to the jury where the state failed to prove essential elements of the crime. This is precisely what Mr. Stedeford did by urging that the state had failed to prove the identity of the victim and the exact date of the crime.

Petitioner urges that Mr. Stedeford was ineffective because of the succinct closing argument presented at the sentencing portion of the trial. Mr. Stedeford's strategy was simple; put petitioner on the stand and allow him through his testimony to engender sympathy from the jury. Frankly, this was all he had (D.Ct.Tr. 78). This strategy, however, was overridden to a certain extent by petitioner who insisted on putting on medical witnesses (D.Ct.Tr. 76, 78-79). However, Mr. Stedeford found nothing wrong with this strategy then, finds nothing wrong with it now, and neither should this Court (D.Ct.Tr. 79).

The strategy then in Stedeford's closing argument was to let the jury concentrate on petitioner's testimony, not his argument. In other words, Stedeford believed at this point that if the jury were to be persuaded against the sentence of death, the persuasion must come through petitioner, and not by him (D.Ct.Tr. 78).

It must be pointed out that petitioner by actively insisting upon the production of witnesses who, in retrospect he found damaging to his case, does not erode Mr. Stedeford's effec-

tiveness. This is just another example of the remarkable clarity of hindsight. Indeed, this very situation was addressed in Foster v. Strickland, 707 F.2d 1339 (11th Cir. 1983). Please note:

> Mayo's assessment of the Bay County, Florida, jury as more likely to respond to an appeal to emotion then to complicated medical proof, and his consequent presentation of the mitigating evidence in this manner, does not rise to the level of constitutionally ineffective assistance of counsel. The evidence Mayo in fact presented covered essentially the same subjects as that which petitioner would have him present. Mayo's choice to present mit gating evidence in the manner he did was a strategic decision informed by years of criminal practice in the region. Mayo's assistance in this regard was not ineffective, nor did it work to petitioner's actual and substantial disadvantage. **Washington v. Strickland** 693 F.2d at 1260.

Id. at 1344. Following the evidentiary hearing in federal court, the district judge concluded as follows:

> In retrospect, it is often easy to be a Monday-morning quarterback, but a finding of constitutionally ineffective representation is not premised upon Monday-morning quarterbacking. Counsel's strategy was to present a good image to the jury by avoiding unnecessary questioning and unnecessary objections, and in the sentencing phase, to place only his youthful client on the witness stand, hoping to incur the sympathy of the jury. That this strategy backfired should not now be considered constitutionally ineffective representation. As the Court stated in **Ford v. Strickland**, 696 F.2d 804 (11th Cir. 1983), "Even where an attorney's strategy may appear wrong in retrospect, a finding of constitutionally ineffective representation is not automatically mandated." [PA-8]

B. The Representation in 1980

Petitioner makes a three-fold attack against the representation afforded him by Mr. Busch at the 1980 resentencing hearing: (1) Mr. Busch did not have time to properly prepare for the 1980 resentencing because up until July of 1980, he did not

realize that the subsequent hearing to be held was a sentencing hearing; (2) Mr. Busch was unprepared at the August 11-12, 1980 resentencing hearing and was not familiar with the witnesses that he called; and (3) he was so exhausted that he was unable to give a proper closing argument. Respondents deny these allegations and the lower courts found them to be without merit.

Mr. Busch at all times had afforded petitioner vigorous and active representation. Indeed, prior to the August 11-12, 1980, resentencing, Mr. Busch had been sufficiently effective to win a stay from the federal district court, resulting in the granting of habeas corpus relief. Raulerson v. Wainwright, 508 F.Supp. 381 (M.D.Fla. 1980). Incidentally, there was no confusion as to the precise relief granted by the federal habeas court. Petitioner was to be afforded "a new sentencing hearing and imposition of sentence, without the necessity of an advisory jury, ..." Id. at 385.

Thus, at the very latest, on July 15, 1980, Mr. Busch was aware that he would have to prepare for the sentencing hearing on or about August 7, 1980, unless he secured an extension of time from the federal district court (Tr.Hrg. 7/15/80, at 15).

At the time of Mr. Busch's representation of petitioner at the resentencing hearing in 1980, his experience in criminal law was extensive. He had worked approximately three years as a felony trial lawyer for the public defender's office of the Second Judicial Circuit and had probably tried six or eight homicide cases (D.Ct.Tr., at 129). Mr. Busch was thoroughly familiar with Fla.R.Cr.P. 3.850 and motions to vacate filed pursuant thereto (D.Ct.Tr. 129). Mr. Busch had handled petitioner's direct appeal to the Florida Supreme Court and consequently had read the original trial transcript, including the sentencing proceedings (D.Ct.Tr. 132). And as noted by Mr. Busch at the

resentencing hearing, he had been acting as petitioner's attorney for approximately five years (Tr.Aug.11-12, 1980, at 8). He had thoroughly reviewed the court record prior to the resentencing hearing (Tr.Aug.11,12, 1980, at 8).

The record discloses that a great deal of mitigating evidence was presented in a coherent manner at petitioner's resentencing. Six witnesses were called and testified on his behalf (Hamlin, Harris, Dermerie, Ramirez, Raulerson, and Farr), including petitioner's mother and his wife.

At the district court hearing, petitioner proffered the affidavits of additional witnesses who, according to him, would have been able to testify in regard to mitigating circumstances. (See Record Exerpts filed by petitioner in lower court, at pp. 84-98). The affidavit of Phyllis Pilgrim states that she would have been willing to testify about petitioner's background and his upbringing. Similarly, the affidavit of Joann Gunn contained additional matters about petitioner's upbringing. The affidavit of John Miller stated that petitioner was honest and truthful and that he did not drink or use drugs excessively to Miller's knowledge. The affidavit of Joseph Ingle, a minister, states that he was willing to testify as to petitioner's character as a "person" as well as a "Christian." Finally, the affidavit of Sheriff Dean Yeager states that he knew petitioner when petitioner helped his surrogate father run a restaurant and that when petitioner's father was killed, petitioner testified as a witness for the state and cooperated with the sheriff's office.

All of this proffered testimony is essentially cummulative to the testimony presented at the 1980 resentencing hearing. For example, petitioner's mother (Virginia Hamlin) testified about the upbringing of her son. She testified that petitioner had always shown her and the rest of his family love and that he

helped provide for the family up until the time he was sixteen (Aug.11-12, 1980, at 83). Gaynell Harris testified at the resentencing hearing about the relationship between petitioner and his surrogate father (her brother), who maintained a restaurant business which petitioner worked in (Aug.11-12, 1980, at 101-123). She said that petitioner was "a very good worker." Aug.11-12, 1980, at 106). Similarly, minister Farr testified about petitioner's spiritual beliefs and, because he was qualified in psychology, about petitioner's psychological makeup (Aug. 11-12, 1980, at 204-233).

Essentially, there is nothing in the affidavits that was not covered by witnesses at petitioner's 1980 resentencing hearing. Even at this late date petitioner's present counsel has been unable to come up with any new witnesses who would have testified to anything significantly different from those witnesses that did testify for petitioner at the 1980 resentencing hearing. Moreover, much of the background material covered by those witnesses was also covered by petitioner himself when he testified at his original trial.

Respondents say that the number, quantity, and quality of character witnesses used at the penalty stage of a capital proceeding is surely a matter of trial tactics. Certainly there is no requirement to call any set number of character witnesses, particularly where the testimony of those additional witnesses would be cummulative. Stanley v. Zant, 697 F.2d 955, 969-970 (11th Cir. 1983).

The truth of the matter is that a review of the 1980 resentencing hearing will show that Mr. Busch was not only effective but was also well prepared. All of the witnesses were examined in an intelligent, purposeful manner. Character evidence was skillfully elicited by Mr. Busch and the six

witnesses called thoroughly covered the life of petitioner. Indeed, petitioner had the advantage of two sentencing hearings with the mitigating evidence adduced at both considered by the trial court.

Finally, petitioner's claim that Mr. Busch was ineffective because he was too exhausted to present a closing argument is wholly devoid of merit. Under the circumstances here, the presentation of a closing argument was unnecessary. This is so because the trial court had the advantage of an eighty-seven page memorandum prepared by Mr. Busch which delineated and thoroughly argued the issues in petitioner's favor. The trial court announced on the record that it would consider this memorandum as closing argument on behalf of petitioner (Tr.Aug.11-12, 1980, at 272). Of course, the trial court gave petitioner every opportunity to make whatever statements he wished to make prior to imposition of sentence (Tr.Aug.11-12, 1980, at 280-286).

C. The Representation Met Constitutional Standards

Prior to Strickland v. Washington, ___U.S.___, 80 L.Ed.2d 674, 104 S.Ct.___(1984), the controlling standard for the determination of an effectiveness of counsel issue was ably set forth in Washington v. Estelle, 648 F.2d 276 (5th Cir. 1981), as follows:

> Washington also raises lack of effective assistance of counsel as a separate ground for relief by way of a Sixth Amendment violation. The Sixth Amendment right to counsel entitles the accused in a criminal proceeding to representation by an attorney reasonably likely to render and rendering reasonably effective assistance. **See, e.g., Hill v. Wainwright**, 617 F.2d 375 (5th Cir.1980) **Russell v. Estelle**, 590 F.2d 103 (5th Cir.1979); **Carbo v. United States**, 582 F.2d 91 (5th Cir.1978); **Herring v. Estelle**, 491 F.2d 125 (5th Cir.1980); **MacKenna v. Ellis**, 280 F.2d 592 (5th Cir.), **modified**, 289 F.2d 928, **Cert. denied**, 368 U.S. 877, 82 S.Ct. 121, 7 L.Ed.2d 78 (1961). Rather, the methodology for applying

> the standard involves an inquiry into the actual performance of counsel conducting the defense and a determination of whether reasonably effective assistance was rendered based upon the totality of circumstances in the entire record. **See, e.g., Lovett v. State of Florida**, 627 F.2d 706 (5th Cir.1980); **United States v. Gray**, 565 F.2d 881 (5th Cir.1978); **Lee v. Hopper**, 499 F.2d 456 (5th Cir.1974). It is within this framework of totality of circumstances that we judge the "fundamental fairness" of the trial and ultimately counsel's effectiveness or ineffectiveness.

Id at 278, 279.

Respondents believe that the case of Webster v. Estelle, 505 F.2d 926 (5th Cir. 1975), well expresses the Fifth Circuit's opinion on the issue of ineffective assistance of counsel. Note the following:

> The fundamental rules by which petitioner's claim must be judged are well settled. The burden of proof is on the petitioner in a habeas corpus proceeding. A judgment of conviction must be presumed to have been reached in accordance with due process unless otherwise shown. "If the result of the adjudicatory process is not to be set at naught, it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrated reality: **Adams v. United States**, 317 U.S. 269, 281, 63 S.Ct. 236 (1942). [Citations omitted.][Emphasis ours.]

Id. at 928.

Courts have expressed a concern that there may be too great an incursion by trial judges or prosecutors into the right of the defense to retain control over the defense. See, e.g., United States v. Decoster, 624 F.2d 196, 208 (D.C. Cir. 1979), en banc; Fitzgerald v. Estelle, 505 F.2d 1334, 1337 (5th Cir. 1975), en banc. In other words, must counsel be forced to reveal that he failed to call a witness, unknown to the prosecution, because his investigation revealed that the witness had harmful testimony

that outweighed whatever benefit the witness could provide? Should a trial judge make an attorney state that he was not objecting because, on balance, irritating a jury did not warrant making a technical objection to evidence that was deemed to be harmless to the defendant? Should the prosecutor have the right to insist that a lawyer seek to suppress a confession which is actually helpful to the defense theory under the facts of a particular case? Should the trial judge or the prosecutor leave their respective roles and actively become, in effect, "associate counsel" for the defendant? It seems reasonable, then, that counsel will not be deemed ineffective for failure to pursue a course of action **if that act or omission is a reasonable tactical decision.**

The perspective from which a claim of ineffective assistance is to be evaluated is whether counsel's assistance falls below the constitutionally minimum level. This ultimate question is not whether the representation was zealous or might have been better. Pollinzi v. Estelle, 628 F.2d 417 (5th Cir. 1980); United States v. Garcia, 625 F.2d 162 (7th Cir. 1980); Dyer v. Crisp, 613 F.2d 275 (10th Cir. 1980), en banc; Herring v. Estelle, 491 F.2d 126 (5th Cir. 1974). It is simply not enough to find that counsel's actions did not satisfy abstract norms or satisfy a checklist of general standards which are suggested as "should normally be dones." "Below the minimum level" must mean just that; it does not mean below the average. For, to be below the average would mean that counsel, by definition, would not satisfy the constitutional standard half the time. United States v. Decoster, 624 F.2d 196 (D.C. Cir. 1979), en banc, cert.denied, 100 S.Ct. 302 (1979); Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. 1978), en banc.

In Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981), the court, citing Rummel v. Estelle, 590 F.2d 103 (5th Cir.

1979), remarked that investigation and preparation are the keys to effective representation. But then the Fifth Circuit went on to remark that the duty to investigate and prepare is far from limitless, and that every breach thereof will not mean that counsel has failed to render reasonably effective assistance. Acknowledging that there is an inevitable and understandable tendency to the contrary, i.e., to find ineffective assistance of counsel on every issue where counsel has failed to investigate and prepare, the Fifth Circuit went on to remark as follows:

> ...Our cases uniformly command that counsel's effectiveness may not be assessed through the finely ground lenses of 20/20 hindsight--and this command is especially compelling in reviewing claims of ineffective assistance that are grounded in allegations of inadequate investigation and preparation. **Reasonably effective assistance" must be judged from the perspective of counsel**, taking into account all of the circumstances of the case, but only as those circumstances were known to hi at the time in question.

Id. at 1356. (Emphasis supplied.) In closing its discussion on the effectiveness of counsel issue in Washington, the Fifth Circut remarked in pertinent part as follows:

> Yet we cannot emphasize too strongly that while this step-by-step method of analysis is, as an initial matter, necessary in order properly to evaluate an ineffective assistance of counsel claim, what is ultimately important is trial counsel's performance on balance and in the context of the entire case. **Our repeated assertions that a criminal defendant is not entitled to perfect or error-free counsel are not mere rhetoric.**

Id. at 1367. (Emphasis supplied.)

Petitioner urges that this case should be remanded for further consideration in light of Strickland v. Washington supra. Not so. The lower court has already considered this case in the light of Strickland v. Washington, supra. The decision of the lower court was handed down on May 1, 1984. Raulerson, 732

F.2d 803. This court decided Strickland v. Washington on May 14, 1984. On May 21, 1984, petitioner filed a petition for rehearing and suggestion of rehearing en banc in the lower court, requesting rehearing on the basis of the Court's decision in Strickland v. Washington, supra. Of course, as noted earlier, the petition for rehearing and suggestion for rehearing en banc was denied by order dated June 11, 1984 (Petitioner's appendix B). Obviously, the lower court saw no reason to disturb its holding because of this Court's decision in Strickland v. Washington, supra. In truth, this court's decision in Strickland v. Washington, supra, furnishes an unshakable bedrock support for the decision of the lower court.

In setting forth the appropriate standard for judging ineffective assistance of counsel claims, the Washington Court remarked as follows:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

80 L.Ed.2d 693. Then, commenting on judicial scrutiny of counsel's performance, the court remarked as follows:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense, to

> conclude that a particular act or omission of counsel was unreasonable. Cf. Engle v. Isaac, 456 US 107, 133-134, 61 L Ed 2d 783, 102 S Ct 1558 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." See Michel v. Louisiana, supra, at 101, 100 L Ed 83, 76 S Ct 158. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. See Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 NYU L Rev 299, 343 (1983).

80 L.Ed.2d 694, 695. This case now makes its third appearance in this Court after having been in litigation for almost ten years. Petitioner's state court trial proceedings, post-conviction proceedings, issues raised in federal habeas corpus, have all been meticulously combed for prejudicial error by both state and federal courts. All of his contentions have been rejected as either being refuted by the record or legally unsupportable. While the death penalty is indeed final, death was also final for Officer Stewart who was murdered by petitioner.

Finally, the Constitution does not require that a defendant receive a perfect trial, only a fair one, Michigan v. Tucker, 417 U.S. 433 (1974); this he received.

CONCLUSION

The petition for writ of certiorari should be denied.

JIM SMITH
Attorney General

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished a copy of the foregoing Brief in Opposition to Mr. Stephen B. Bright, 600 Healey Building, 57 Forsyth Street, N.W., Atlanta, GA 30303, by U.S. Mail, this 19th day of September, 1984.

Wallace E. Allbritton
WALLACE E. ALLBRITTON
Assistant Attorney General

of Counsel

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

STATE OF FLORIDA,
Respondent,

vs.

JAMES DAVID RAULERSON,
Petitioner.

CRIMINAL DIVISION
CASE NO. 75-1323-CF

FILE
MAY 14 1980

AFFIDAVIT

Before me, the undersigned authority, an officer duly authorized to administer oaths, on this day personally appeared Walter E. Stedeford, Esquire, who, being by me first duly sworn, deposes and says:

1. That he has been engaged in the private practice of law in the City of Jacksonville since 1963 and has been a member of the Florida Bar since November, 1962; his practice has consisted of representing persons accused of crimes with about 40% of his time being devoted in this area; on six (6) occasions he has represented defendants charged with capital crimes with three (3) of these defendants having been tried by a jury in Duval County, Florida.

2. That he was the trial attorney and was involved in all phases of the representation of the defendant from the date of arrest through the denial of motion for new trial for the defendant.

3. That he was retained by friends and or relatives of the defendant at or immediately after the date of arrest of the defendant.

4. That he was of the opinion and belief that from the initial conference with the defendant that his chances of a successful defense in the guilt-innocent phase of the trial was non-existent and that all of his efforts should be used in the penalty phase of the trial; that he deposed all persons whose names were supplied to him in response to the Demand for Discovery filed and filed the pre-trial motions allowable and available to a defendant under the Rules of Criminal Procedure; that it was his belief and strategy for trial that the best interest of the defendant would be served if he took no trial action that would in any way inflame the jury, or prejudice the defendant, when the jury must consider the penalty to be imposed upon the defendant, which would include a non-adversary position as to documents and

other tangible evidence which was, in his opinion, relevant and material, and that undue objections, of questionable merit, and other comments and statements made, in the jury's presence should and must be avoided at all costs. That it was not until the conclusion of the State's case in chief that the defense of the State's failure to properly prove the identity of the deceased, as alleged in the indictment, arose, which matter could not have been determined prior to trial and thus form a basis for an overal strategy in the trial. The undersigned felt that there was absolutely no defense to the action if the State proved all of the essential elements required for a conviction, and he was of the opinion and belief that there was sufficient proof available for a conviction. The only viable defense available to the defendant was the failure of the State to prove some essential element.

5. That he visited with the defendant several times while he was hospitalized and on a non-regular but recurring basis while the defendant was in the Duval County Jail, discussing with him the status of the action and the discovery being implemented and the plan to be used by him in the defense of the action. He did not keep time records nor memoranda of these conferences with the defendant and the monies paid on behalf of the defendant for fees and costs were sufficient so that he did not feel that the defendant would not get adequate representation for lack of funds.

6. That he is making this affidavit in response to the motion for post-conviction relief filed by the defendant pursuant to Rule 3.850 and 3.987, F.R.C.P. That the following is an explanation of those allegations contained in paragraph X of the aforementioned motion:

(a) That he did not file a formal motion for change of venue as it has been his experience in the trial of both capital and non-capital cases that judges of the Circuit Court of Duval County, Florida, use an ad hoc basis for determining a change of venue and will not change venue unless a jury cannot be empaneled; he discussed the change of venue with the trial judge, the

Honorable Susan S. Block, who confirmed this procedure.

(b) That he did not object to the prosecutor's comment in opening statement that the defendant would testify because he did not hear or perceive this statement.

(c) That he did not object when the trial court did not admonish the jury to avoid viewing the scene of the offense because the court did not give this admonition and he could not object to a "non-statement".

(d) He did not object to the prosecutors use of the word "animal" because he did not remember nor perceive the prosecutors use of this word and upon reading the transcript is of the opinion and belief that the words "trapped animal" are not inflammatory.

(e,f,j) He did not object because he did not perceive the error that was allegedly committed by the trial judge.

(g) He did not object because he is of the opinion and belief that the statements made by the prosecutor were not objectionable.

(h) He did not object because he felt that the procedure implemented by the court was proper and correct.

(i) He consulted with the defendant regarding the Presentence Investigative Report and discussed the report with the defendant and he is of the opinion and belief that the defendant understood and perceived the contents of the report and that his discussion of the P.S.I. with the defendant was prior to the imposition of sentence.

(k) That he did not object to the State's introduction of prior criminal activity, without conviction for same, because he did not perceive that the introduction of this testimony was objectionable.

(l) That in his closing argument in the penalty phase, his sole objective and purpose was not to be explicit nor to comment on the evidence adduced at the sentencing phase; he felt, that to attempt to explain the evidence in a rational manner would be fruitless.

(m,n,o) He is of the opinion and belief that he possesses sufficient knowledge of the law, that he adequately prepared for trial, and that he provided effective assistance of counsel, to the defendant at all phases of the trial.

7. That he has discussed the pending aforesaid motion with representatives of the Office of the Public Defender, State Attorney General, and a representative of the Office of the State Attorney of Duval County, Florida, and the above statements, impressions, opinions, and beliefs, are based on his memory of the matters that existed in 1975, being refreshed by his reading the entire trial transcript as provided by both the Public Defender and the State Attorney General.

WALTER R. STEDEFORD

Sworn to and subscribed
before me this 9th
day of May, 1980

S. Diane Page
Notary Public, State of Florida
at Large

Notary Public, State of Florida at Large
My Commission Expires Sept. 30, 1981
Bonded by American Ins. & Casualty Company

REPLY BRIEF

ORIGINAL

No. 84-5247

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

JAMES DAVID RAULERSON,

Petitioner,

vs.

LOUIS L. WAINWRIGHT, Secretary Florida Department of Offender Rehabilitation, RICHARD DUGGER, Superintendent of Florida State Prison, and JIM SMITH, Attorney General, State of Florida

Respondents.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Respondents.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, James David Raulerson, has petitioned this Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit affirming the denial of a writ of habeas corpus regarding his conviction and sentence of death in the State of Florida. Respondents [hereinafter referred to as "the State"] have filed a brief in opposition. Petitioner submits this response to the opposition in order to clarify the important constitutional issues which are before this Court.

The State, in its opposition, suggests that a determination of two substantive constitutional rights, the right of self-representation, Faretta v. California, 422 U.S. 806 (1975), and the right to have mitigating evidence factored into the sentencing decision, Eddings v. Oklahoma, 455 U.S. 104 (1982), turn on mere semantics. This is basically the position taken in the court opinions below. It is precisely because such an analysis eviscerates these constitutional guarantees that this Court should issue a writ of certiorari to review and correct the

decision below. If the holdings in Faretta and Eddings are to be reexamined, this Court should grant certiorari and consider those questions upon full briefing and argument instead of allowing the decision below to subvert those decisions.

In addition, the State argues in its brief in opposition the effectiveness of trial counsel at the sentencing hearing before the advisory jury in 1975. However, the Court of Appeals for the Eleventh Circuit refused to even consider counsel's effectiveness at that hearing. The question presented by this aspect of the Eleventh Circuit's decision is not whether counsel was effective, a question never decided by the Eleventh Circuit, but whether the question of his effectiveness is beyond review under the standards of the Sixth Amendment despite the critical role the jury's recommendation of punishment plays in the ultimate sentencing decision. Petitioner asserts that he is entitled to a decision by the Court of Appeals on whether counsel's performance, in which he admitted his ineffectiveness to the jury in his final summation, met the standards of the Sixth and Fourteenth Amendments.

I. THERE COULD NOT BE A MORE UNEQUIVOCAL ASSERTION OF THE RIGHT TO SELF-REPRESENTATION THAN THAT MADE BY PETITIONER, AND PETITIONER SHOULD NOT BE DENIED THAT RIGHT BECAUSE OF THE TRIAL COURT'S ERRONEOUS UNDERSTANDING OF THE LAW

The State maintains that Mr. Raulerson did not make an unequivocal assertion of the right of self-representation despite a written motion to the trial court in which he stated: "I wish to make motions to: 1. appear pro se (Faretta v. California), 95 S.Ct. 2525. . . . I cannot persist being no part of my defense." PCR R. at 6-7. It is sheer torture of the English language to suggest that such an unconditional statement, citing the trial court to the governing case law, is in any way equivocal. It simply is not. Once Mr. Raulerson invoked Faretta, the trial court was constitutionally required to follow it. However, instead the court inexplicably relied on a decision of a Florida intermediate appellate court which had been overruled two months before the hearing on August 11 and 12, 1980.

The State's brief in opposition then makes the following completely false assertion: "On August 11, 12, 1980, petitioner made the request to act as cocounsel with Mr. Busch." Brief in Opposition at 5. On the same page, the State characterizes Mr. Raulerson as "accepting the court's offer of corepresentation." At no point in the 287 pages of transcript of the hearing on August 11 and 12, 1980, did James David Raulerson make any request to act as co-counsel. The trial court advised Mr. Raulerson at the start of the hearing:

> [T]he court has reviewed the authority in this area, and the Court has reviewed Article One Secti.n 16 of the Florida Constitution, and the case law in the area, including Tate versus State 362 So.2d 292, the Court is inclined to feel that the law is pretty clear, that in the State of Florida, a defendant is entitled to represent himself along with Counsel . . . . and so, if the Defendant continues to wish to participate in the representation of himself in this resentencing hearing, the Court will certainly revisit that request, if he wants to participate with Counsel in this sentencing hearing.

Tr. August 11-12 hearing at 6-7 [emphasis added]. Thus, instead of relying upon Faretta, which had been cited to it by Mr. Raulerson in his motion to proceed pro se, the trial court relied upon a decision of the Fourth District Court of Appeals of Florida, Tait v. State, 362 So.2d 292 (Fla. 4th DCA 1978), which, unknown to the trial judge, had been overruled in State v. Tait, 387 So.2d 338 (Fla. 1980).

Thus, a pro se litigant was told by the trial judge in response to his motion that he was getting all the law allowed, the right to represent himself along with counsel. To now hold Mr. Raulerson responsible for an erroneous ruling by the trial court is untenable. Had Mr. Raulerson requested the right to act as co-counsel on August 11, there would have been no error. But no such request was made. The statement in the Brief in Opposition and in the Eleventh Circuit's opinion[1] that such a request

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1. The Eleventh Circuit opinion incorrectly states that Mr. Raulerson "subsequently requested and was granted the right to serve as co-counsel . . . ." after making his Faretta motion. Raulerson v. Wainwright, 732 F.2d 803, 809 (11th Cir. 1984).

(footnote continued on following page)

was made is a mistake of material fact completely without support in the record. Moreover, as previously pointed out in the Petition for a Writ of Certiorari at 10, the hearing on February 6, 1981, six months after the sentencing hearing, regarding Mr. Raulerson's ability to represent himself on appeal, is totally irrelevant to the Faretta motion made on July 15, 1980, and erroneously ruled upon by the trial court on August 11, 1980.

II. EDDINGS v. OKLAHOMA REQUIRES A SENTENCER TO DO MORE THAN PATIENTLY HEAR EVIDENCE OFFERED IN MITIGATION; MITIGATING EVIDENCE MUST BE INCLUDED IN THE WEIGHING PROCESS.

The State suggests that Florida and Eleventh Circuit cases holding that so long as the sentencer "patiently hear[s]" any evidence proffered in mitigation are in "complete harmony" with Eddings v. Oklahoma, 455 U.S. 104 (1982). Brief in Opposition at 9, citing Palmes v. Wainwright, 725 F.2d 1511, 1523 (11th Cir. 1984). But that is exactly what the trial court did in Eddings, and this Court found it insufficient because certain mitigating factors were given "no weight at all" because they were not included in a weighing process virtually identical to the one employed under Florida's death penalty law. 455 U.S. at 114-115.

The State's position ignores the fact that the Eleventh Circuit has expanded a sentencing authority's discretion to the point where evidence of mitigating circumstances need not be included in the weighing process of deciding punishment in a capital case. Here, the court held that such discretion included the power to give mitigating circumstances "no weight at all." Raulerson, 732 F.2d at 807. In contrast with the "complete harmony" posited by the State, therefore, the decision of the Eleventh Circuit has resulted in a situation where this Court's guarantee that a death sentence be imposed only after considera-

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(footnote continued from previous page:)

The motion to proceed pro se under Faretta was made on July 18, 1980, three days after Mr. Raulerson's motion to act as co-counsel had been denied by the trial court. No motion or request to act as co-counsel was ever made after the motion to proceed pro se was filed. Mr. Raulerson accepted co-counsel status only after the trial court had ruled that it was all the law allowed.

tion of evidence of "any aspect of a defendant's character . . . that the defendant proffers as a basis for a sentence less than death," Lockett v. Ohio, 438 U.S. 586, 604 (1978); Eddings, 455 U.S. at 114-115, is vitiated by a definition of discretion which enables a sentencing authority to completely disregard factors in mitigation.

Petitioner recognizes that the weight to be given any one factor is wholly within the discretion of the sentencer. See, e.g., Herring v. State, 446 So.2d 1049, 1057 (Fla. 1984) (trial court found difficult childhood, learning disabilities, and age of 19 were mitigating, but weight given to those circumstances did not outweigh aggravating circumstances established). Petitioner also recognizes that a defendant's proof may fail to establish a mitigating circumstance. See, e.g., Agan v. State, 445 So.2d 326, 328 (Fla. 1983) (trial court did not err in failing to consider age 54 as a mitigating circumstance because this age did not require special consideration). Here, however, neither of those situations exist in this case.

Instead, the trial court reached a legal conclusion that uncontested, unrebutted evidence did not constitute nonstatutory mitigating circumstances under that court's interpretation of Lockett v. Ohio. That conclusion was then upheld by the Eleventh Circuit's holding that the sentencing authority's discretion to determine the specific weight to be given mitigating circumstances includes the absolute power to conclude that certain mitigating circumstances may be afforded no weight at all. Contrary to Eddings and Lockett such a rule permits imposition of a death sentence without any requirement that mitigating circumstances be taken into account in deciding if death is the appropriate punishment.

The language of the trial court also strongly suggests that it viewed as mitigating only factors surrounding the commission of the crime and not circumstances connected with the background and character of the individual offender. Therefore, the failure to grant certiorari in this matter would sanction the significant

erosion of Eddings, Lockett, Woodson v. North Carolina, 428 U.S. 280 (1976), and the fundamental Eighth Amendment principle that a capital proceeding reflect the individualized consideration of all the facts and circumstances surrounding the offender and the offense. Zant v. Stephens, __U.S.__, 103 S.Ct. 2733, 2743-44 (1983).

III. THE FAILURE OF THE ELEVENTH CIRCUIT TO CONSIDER WHETHER COUNSEL WAS EFFECTIVE AT THE SENTENCING HEARING BEFORE THE ADVISORY JURY REQUIRES A REMAND TO THE ELEVENTH CIRCUIT.

Petitioner set out in detail in his Petition for a Writ of Certiorari the gross inadequacies of his counsel in both 1975 and 1980, and suggested that they should be viewed under the standards recently announced in Strickland v. Washington, __ U.S. __, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). The State has responded by arguing that counsel was effective at all stages, including the sentencing hearing before the advisory jury in 1975. Although much could be pointed out in response to the State's assertions of effectiveness,[2] such elaborate discussion of the specifics of the performances of counsel is inappropriate in this response. However, the State failed altogether to respond to petitioner's contentions that the Eleventh Circuit should have reviewed the performance of his counsel at the 1975 sentencing hearing before the advisory jury. See Petition for a Writ of

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2. E.g., the State asserts that Mr. Stedeford "employed the services of a psychiatrist or psychologist" (Brief in Opposition at 12), when in fact the doctors who examined Mr. Raulerson were appointed by the court and Mr. Stedeford did not even know the meanings of their diagnoses of his client (D. Ct. Tr. at 49, 52-53); the State points out that Mr. Stedeford deposed some of the witnesses (Brief in Opposition at 12), but fails to mention that none of the depositions were transcribed nor did Mr. Stedeford make any notes on the depositions (D. Ct. Tr. at 27); the State asserts that Mr. Stedeford was "thoroughly familiar with the law surrounding a motion for a change of venue on the ground of pretrial publicity" (Brief in Opposition at 13), when in fact Mr. Stedeford admitted in District Court he was not aware of the holding in Rideau v. Louisiana, 373 U.S. 723, 726-27 (1963) (D. Ct. Tr. at 85); and the State tries to get around the fact that no lawyer ever argued for Mr. Raulerson's life by suggesting that the court's consideration of an 87-page legal memorandum, written before Mr. Raulerson had been granted a new sentencing hearing and dealing with legal issues raised in a motion for post-conviction relief which were completely irrelevant to the punishment question, was an adequate substitute for argument on the issue of punishment.

Certiorari at 24-28. Instead, the State attempts to paint Mr. Stedeford's performance at the hearing as adequate, blaming Mr. Raulerson for insisting that his counsel do something after counsel had provided almost no professional assistance at the guilt-innocence phase,[3] and characterizing Mr. Stedeford's pathetic closing remarks (Appendix E to the Petition for a Writ of Certiorari) as a "strategy to let the jury concentrate on petitioner's testimony, not his argument."[4]

In Burger v. Zant, ___ U.S. ___, 81 L.Ed.2d 360 (No. 83-6413, May 29, 1984), this Court granted a petition for a writ of certiorari and remanded the case to the Court of Appeals because the opinion of the District Court, adopted by the Court of Appeals, may have been "flawed in at least one respect."[5] The Court held that the petitioner "is entitled to an assessment of his ineffectiveness claim unaffected by this, as well as by any other, error." 81 L.Ed.2d at 360. The refusal of the Court of

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3. Because Mr. Stedeford had conducted absolutely no investigation in preparation for the sentencing phase of the trial, he was unable to do anything except call the doctors who had been appointed by the court for the purposes of determining competency for trial and sanity at the time of the commission of the offense, neither of which was an issue at the trial or sentencing hearing. Thus, he was unable to present the wealth of mitigating evidence about his client's employment, family and other aspects of his background which were readily available.

4. If indeed this had been Mr. Stedeford's "strategy", it could have been accomplished easily enough by asking the jury to consider Mr. Raulerson's testimony in deciding punishment. Instead, counsel confessed his ineffectiveness and told the jury that he did not think he could persuade them to spare his client's life after they had found him guilty of murdering a police officer. T. Tr. 546-547 (Appendix E to the Petition for a Writ of Certiorari).

5. The opinion in Burger was flawed because "[i]n judging the reasonableness of counsel's decision not to present character evidence, the District Court apparently mistook the arguments counsel made at petitioner's first, ultimately vacated, sentencing hearing for the argument counsel made at petitioner's second sentencing . . . . " 81 L.Ed.2d at 360. Although Mr. Raulerson's first sentence was vacated because of the failure to provide him with the presentence report at the sentencing before a judge in violation of Gardner v. Florida, 430 U.S. 349 (1977) in Raulerson v. Wainwright, 508 F. Supp. 381 (M.D. Fla. 1980), the Court did not consider whether the jury's recommendation of sentence was tainted by constitutional error. Mr. Raulerson's second sentence of death was imposed by the trial court and review by the Florida Supreme Court on the basis of the jury recommendation of death in 1975.

Appeals below to consider the claim of ineffectiveness at Mr. Raulerson's only jury sentencing hearing is a similarly egregious flaw, and Mr. Raulerson is, therefore, entitled to have his claim considered. If he can demonstrate that counsel's abject ineffectiveness deprived him of a life recommendation from the jury, he would be entitled to habeas corpus relief.[6] The failure of the Court of Appeals for the Eleventh Circuit to consider Mr. Raulerson's claim of ineffectiveness at this most critical stage of Florida's trifurcated procedure requires a remand for consideration of this claim by the appellate court.

CONCLUSION

For the reasons set out herein as well as those previously put forth on behalf of Mr. Raulerson in his Petition for a Writ of Certiorari, this Court should issue a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit. In the alternative, this Court should vacate the Court of Appeals decision and remand this case for further consideration of the entire ineffectiveness claim in light of Strickland v. Washington, or consideration of the claim of ineffectiveness at the jury sentencing hearing.

Respectfully submitted,

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6. See, the cases set out in fn. 14 of the Petition for a Writ of Habeas Corpus. Those cases establish that if a defendant is denied adequate counsel at the hearing before the advisory jury, he is entitled to a new hearing before an advisory jury despite the fact that under Florida's trifurcated capital scheme, a presentence report may be prepared and further argument and evidence may be presented before the trial judge, who makes the ultimate sentencing decision. Similarly, it is well established that a capital defendant is entitled to a new sentencing hearing if jurors were excluded in violation of Witherspoon v. Illinois, 391 U.S. 510 (1968), even though the judge ultimately makes the decision as to punishment. See, e.g., Darden v. Wainwright, 725 F.2d 1526, 1528-1532 (11th Cir. 1984) (en banc), cert. denied, ___ U.S. ___, 81 L.Ed.2d 882 (1984); Chandler v. State, 442 So.2d 171 (Fla. 1983).

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October 8, 1984

OPINION

SUPREME COURT OF THE UNITED STATES

JAMES DAVID RAULERSON *v.* LOUIE L. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 84–5247. Decided October 29, 1984

The petition for a writ of certiorari is denied.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting.

In *Faretta* v. *California*, 422 U. S. 806 (1975), this Court held that a defendant in a state criminal trial has a right under the Sixth and Fourteenth Amendments to proceed without counsel if he clearly and unequivocally asks to do so. In this case, the petitioner made a motion to represent himself in which he cited *Faretta*. According to *Faretta*, when such a motion is made, the court must assure that the petitioner understands the dangers of his decision, and that the decision is knowing and voluntary, and then rule on the motion. The state trial court, however, did not make such an inquiry and effectively denied the motion. Reviewing the District Court's denial of a petition for habeas corpus, the Federal Court of Appeals held that the state trial court had not committed reversible error because events *subsequent* to petitioner's assertion of the right demonstrated that petitioner's initial request was ambiguous. 732 F. 2d 803 (CA11 1984). The analysis of the Court of Appeals reflects a funda-

mental misunderstanding of the nature of the right guaranteed by *Faretta*. I, therefore, dissent.

I

The facts of this case are not in dispute. Petitioner James David Raulerson was convicted of first-degree murder and sentenced to death. His death sentence was stayed by a Federal Distict Court, 508 F. Supp. 381 (MD Fla. 1980), and a second sentencing hearing was scheduled to be held in state court. Before the second sentencing hearing, petitioner expressed considerable dissatisfaction with his attorney, and the attorney asked the court's permission to withdraw. The court denied the motion. Thereafter, on July 15, 1980, three weeks prior to the second sentencing hearing, Raulerson asked the trial court to permit him to act as co-counsel with his attorney. The court denied his motion. Next, on July 18, petitioner wrote a letter to the trial judge specifically requesting permission to appear *pro se*:

> "Upon calling [court-appointed counsel] Mr. Busch today I am met with cold indifference. . . .
>
> "With these things to your attention I wish to make motions to:
>
> "1. appear pro se (Faretta vs. California) 95 S. Ct. 2525. . . . I cannot persist being no part of my defense. . . ." Pet. for Cert. 9.

The state court provided a copy of the letter to counsel and did nothing more. At the start of the sentencing hearing, the trial judge told Raulerson that under Florida law he could appear as co-counsel and that if he "continues to wish to participate in the representation of himself," *id.*, at 6, he would allow him to participate as co-counsel. In other words, the trial judge instructed Raulerson precisely to the contrary of what the law is, indicating that he could not proceed on his own but could proceed as co-counsel. Later in the hearing, the trial judge reversed himself and held that Raulerson could not even participate as co-counsel. Also at the sentencing hearing, counsel asked for a continuance and informed the court that he was not prepared to proceed; at the end of the hearing, counsel stated that he was too exhausted and unprepared to give a closing argument. Raulerson, of course, had been denied the right to act as his own counsel. *As a result, no argument against the death penalty was presented on Raulerson's behalf.*

The court sentenced petitioner to death. About six months later, in February 1981, the court held a hearing to consider petitioner's desire to discharge counsel for refusal to pursue the *Faretta* issue on appeal. At that time, the court began an inquiry such as that required by *Faretta*. In the course of the hearing, Raulerson walked out.

On the basis of the foregoing, when the Court of Appeals for the Eleventh Circuit reviewed the denial of Raulerson's habeas petition, it concluded that Raulerson failed to make an unequivocal assertion of a right to relinquish counsel prior to February 1981. 732 F. 2d, at 808. The court noted that Raulerson did not "diligently" pursue his initial motion after it was filed, and that he did not renew his request. On this point, the court did not consider the effect of the trial judge's ruling, in response to Raulerson's *Faretta* motion, that *at best* Raulerson might have a right to proceed as co-counsel. Finally, the Court of Appeals observed in passing that even if the assertion of the right to self-representation was unequivocal it was waived when Raulerson proceeded with counsel. Again, the Court of Appeals did not acknowledge that the state trial judge had told petitioner that at most he could participate as co-counsel, and that even that ruling later was reversed. Nor did the appeals court suggest what other course petitioner might have followed at that time, after he was told that he could, at most, act as co-counsel.

A dissenting member of the panel concluded that "the failure of the trial court to respond affirmatively to [Raulerson's] demand for the right to represent himself as required in *Faretta* was an absolute and final denial of that right which

was not waived by his subsequent conduct." *Id.*, at 814 (Tuttle, J.). Judge Tuttle further pointed out that it was not reasonable to characterize the petitioner's position as ambiguous when "[w]hatever vacillation appears in the record as it now stands was . . . the fault of the trial judge, whose vacillation could hardly be expected to have been treated by a nonlawyer defendant any differently than it was." *Ibid.* Moreover, as the dissent reasoned, "[u]nless we can assume that Raulerson would have acted the same way if the trial court, in response to his first demand, had undertaken in a proper manner to acquaint him with the problems he faced, then it seems to me that the trial court's failure to hold such a hearing could not be deemed as being ratified because six months after the sentencing hearing, he acted in the manner in which he did." *Ibid.*

To my mind, there can be no dispute that Raulerson clearly and unequivocally asserted his right to proceed *pro se* before the sentencing hearing and was denied that right. The majority's *post hoc* rationalization for the trial court's failure to engage in a *Faretta* inquiry at that point makes a mockery of the right recognized by this Court.

II

The exercise of the right recognized in *Faretta* entails a concomitant waiver of the right to counsel expressly guaranteed by the Sixth Amendment. Accordingly, we indicated in *Faretta* that defendants should be permitted to exercise their right of self-representation only if they execute a valid waiver of their right to counsel, which is to say, only if they "'knowingly and intelligently' forego [the] relinquished benefits" of counsel. 422 U. S., at 835 (citing *Johnson* v. *Zerbst*, 304 U. S. 458, 464–465 (1938)). Further, we held, judges are to assure that defendants are made aware of the "dangers and disadvantages of self-representation," 422 U. S., at 835, before permitting them to relinquish counsel. In other words, since a defendant must act affirmatively to relinquish

the right to counsel, it follows that the right of self-representation must affirmatively be asserted as well. We thus have emphasized that courts should not bend over backward to hold that a defendant, who merely hints that he might be better off representing himself, has waived his right to counsel. Cf. *Brewer* v. *Williams*, 430 U. S. 387 (1977) (mere failure to request counsel does not result in waiver of right to counsel).

These precautions, which are so necessary to protect the right to counsel, may not be permitted to eviscerate the right of self-representation. Just as we must be watchful not to find a waiver of the right to counsel where none was intended, so must we be cautious not to overlook an asserted right to proceed *pro se* in our well-meant effort to protect the right to counsel. Accordingly, in *Faretta* we indicated that a defendant's clear and unequivocal assertion of a desire to represent himself must be followed by a hearing,[1] in which he is "made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Faretta*, 422 U. S., at 835. A *Faretta* hearing offers a court ample opportunity to assure that a defendant understands and accepts the consequences of his decision, and to create a record to support its finding of a knowing waiver. As a result, once a defendant affirmatively states his desire to proceed *pro se*, a court should cease other business and make the required inquiry. It is through this hearing that the right to counsel is protected.

The foregoing makes clear, then, that if a trial court judge holds a *Faretta* hearing when the accused clearly asserts his desire to proceed *pro se*, the result will not do harm to the right to counsel. At the same time, the *failure* to hold a

[1] This rule of course would not apply mechanically to repetitive motions, motions designed to obstruct, or motions that are made at inappropriate times. The issue does not arise here, since petitioner filed his motion well before the sentencing hearing began, and there is no suggestion that he acted for any inappropriate reason.

Faretta inquiry at this time *will* do injury to the right recognized in *Faretta*. Delay in holding a hearing after the right is unequivocally asserted undermines that right by forcing the accused to proceed with counsel in whom he has no confidence and whom he may distrust. For that reason, a *post hoc* effort to construe as subsequently ambiguous a clear assertion of a desire to proceed on one's own, such as that undertaken by the Court of Appeals in this case, contravenes the right. It encourages courts to leave a *Faretta* motion pending, in the hope that the request will eventually be construed as ambiguous. It therefore follows that sufficient protection of the *Faretta* right may only be achieved if the trial court is required to hold a hearing when the right is asserted. On review, a court need look only to the character of the assertion, and not beyond, to assure no error was committed.[2]

Lower courts generally have agreed that the character of the assertion itself, and not subsequent developments, determines whether there has been a sufficiently clear request to proceed *pro se*. See, *e. g.*, *Brown* v. *Wainwright*, 665 F. 2d 607, 611 (CA5 1982) (en banc). If a request is ambiguous, the trial judge need not respond, because there has been no clear indication of a desire to waive a right to counsel. If the request is clear, however, a *Faretta* hearing must follow, to assure that the defendant is not required to proceed with the unwanted assistance of counsel. Viewed on its own, Raulerson's original request to proceed *pro se* was as unambiguous as such a request can be. Under the analysis of these other courts, he therefore was denied the right of self-representation. Thus, the Court of Appeals' *post hoc* rationalization of the trial court's failure to engage in a *Faretta* inquiry is not

[2]The State points out in its opposition to the petition that courts have found waiver of the right to proceed *pro se* on the basis of subsequent occurrences. In those case, however, the reviewing courts found an assertion of the right followed by a waiver; they did not find that the right was never asserted.

only at odds with the holding and spirit of *Faretta*, but also with lower court opinions construing *Faretta*. I therefore dissent from the Court's decision not to review the judgment of the Court of Appeals.

III

I continue to adhere to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. See *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting); *Furman* v. *Georgia*, 408 U. S. 238, 314 (1972) (MARSHALL, J., concurring). But even if I accepted the prevailing view that the death penalty may be constitutionally imposed under certain circumstances, I would grant this petition for the reasons set out above.